

**RULE 11 AND OTHER SANCTIONS
AVAILABLE TO THE BANKRUPTCY COURT
THE PENNSYLVANIA BAR INSTITUTE**

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Sanctions in the Bankruptcy Court

Our goal in preparing these materials was to define the sources and explore the scope of the Bankruptcy Court's ability to invoke sanctions upon parties and their counsel. The opportunity to prepare these materials was made more challenging by the enactment of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which imposes additional and heightened responsibilities on counsel, and the pendency of the proposed Lawsuit Abuse Reduction Act of 2004, which has prompted much judicial review and concern.

I particularly would like to thank and recognize my co-authors, Stacy A. Lutkus and Christine A. Trapasso. Stacy is an associate in the Business and Finance Practice Group at Morgan, Lewis and Christine is a third year law student at William and Mary School of Law who spent the summer of 2005 as a summer associate at Morgan, Lewis.

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I. Sanctions in the Bankruptcy Court

A. Sources of Power—What Options are Available to the Bankruptcy Courts?

1. Federal Rule of Civil Procedure (“FRCP”) 11 and its Bankruptcy counterpart Federal Rules of Bankruptcy Procedure (“FRBP”) 9011.
 - a. Landon v. Hunt, 977 F.2d 829, 833 n.3 (3d Cir. 1992). (The Third Circuit found that FRBP is the Title 11 equivalent to FRCP 11, noting that “[t]he policies underlying both rules are the same”). In Landon, the creditor had filed a lawsuit against the Debtors to recover a commission for the sale of the Debtors’ antique desk. Because the creditor failed to attend scheduled court hearings, the action was dismissed. Creditor and creditor’s attorney subsequently filed an involuntary bankruptcy petition against the Debtors. The court, noting that the creditor and his attorney knew that their claim was not based in law or fact, described the behavior as “the most flagrant abuse of the procedure for involuntary petitions that the Court has experienced.” Id. at 833.
 - b. In re Harker, 241 B.R. 357, 365 (Bankr. M.D. Pa. 1999) (asserting that cases under the similar FRCP 11 are helpful in analyzing the disposition of cases under FRBP 9011 because both rules advance the same policies).
2. Unreasonable and Vexatious Multiplication of Proceedings under 28 U.S.C.S. § 1927.
3. Inherent Power of the Federal Courts pursuant to 11 USCA § 105(a).
4. Employment of Professional Persons: Disclosure of Connections pursuant to FRBP 2014.

B. Purpose and Effect of Sanctions

1. Deter Unnecessary Filings With The Court and Deter Future Violations.
 - a. In re Marker, 133 B.R. 340, 347 (Bankr. W.D. Pa. 1991) (“Rule 9011 is designed to discourage pleadings that are ‘frivolous, legally unreasonable, or without factual foundation.’”).
2. Deter the Filing Of Bankruptcy Petitions That Are Frivolous and Not Grounded By Facts.

a. Encourages counsel to stop, think, investigate and research the filings they make. In re Tarasi & Tighe, 88 B.R. 706, 710 (Bankr. W.D. Pa. 1988).

b. “Rule 9011 requires that every paper presented to the court is a certification that such paper is not presented for any improper purpose and that the legal contentions therein are warranted by existing law.” In re Vincente, 257 B.R. 168, 178 (Bankr. E.D. Pa. 2001).

3. Deter Filings Driven By An Improper Purpose and Uphold the Integrity of the Law.

a. The provisions of the Bankruptcy Code should be utilized only for a “legitimate bankruptcy purpose.” In re Bailey, 321 B.R. 169, 183 (Bankr. E.D. Pa. 2005). In Bailey, the Debtor’s attorney had failed to conduct a thorough investigation of his client’s prolific bankruptcy filing history. The court found that the Debtor and her former husband had manipulated the Bankruptcy Code to stay an imminent sheriff’s sale of their home and criticized the attorney for his inadequate due diligence. Id. at 181.

Debtor and her former husband (“Husband”) were joint owners of the home (the “Property”) in which Debtor resided. Before their divorce, Debtor and Husband had filed a joint Chapter 7 petition, due to their inability to make the required mortgage payments on the Property. In the years following discharge of the joint petition, Debtor and Husband each filed multiple individual petitions. After Debtor had filed the seventh bankruptcy petition affecting the Property, the court imposed a 180-day bar order against refiling on her. During the bar order time period, Debtor filed a Chapter 13 petition *pro se*. This action resulted in a second bar order prohibiting Debtor from filing any future bankruptcy petitions in the U.S. Bankruptcy Court without the express permission of the court. Facing an impending sheriff’s sale, the Debtor contacted a new attorney (“Counsel”). Counsel conducted one PACER search and claimed that he was unaware of the second bar order and the Debtor’s “long bankruptcy history.” 321 B.R. at 175. Counsel proceeded to file a ninth bankruptcy petition on behalf of Debtor, which petition immediately was dismissed. With the sheriff’s sale of the Property still pending, Counsel proceeded to file a tenth bankruptcy petition on behalf of Husband. At the show cause hearing on Husband’s petition, the bank that held the mortgage on the Property alleged that Counsel had filed the petition in

bad faith. Counsel, asserting a defense, claimed that he had acted properly in relying on the Debtor and on his own legal research. The court disagreed and stated that the “problem of serial filing of Chapter 13 cases is epidemic in no small part because of lawyers who will take any case at the request of a debtor about to lose his or her house to a sheriff’s sale” without extensive investigation. Id. at 179. The court explained that Debtor’s lengthy filing history created a “heightened duty of inquiry” on Counsel and that the client must demonstrate the ability to perform “**before** the case is filed.” Id. at 182.

b. In In re Armwood, 175 B.R. 779 (Bankr. N.D. Ga. 1994), the attorney’s lack of due diligence and investigation into his client’s filing history prompted the judge to condemn strongly the attorney’s behavior:

“When one or more attorneys allow one or more clients to abuse the system, the harm which devolves is not limited to the affected creditors. By example and word of mouth, the "technique" spreads until it is no longer perceived by the Bar and by debtors as an abuse but as a permissible manipulation of the system. In the meantime, respect for the bankruptcy system, including attorneys who wish to assist honest debtors, deteriorates. When public respect for any part of the legal system falters, it harms everyone involved in the system, which must rely on honest participation.” Armwood, 175 B.R. at 791.

In Armwood, Debtor, an attorney, and his counsel filed his fifth bankruptcy petition with the court. Because the same attorney had represented Debtor in his third petition, the court admonished the Debtor’s counsel for not engaging in a “thorough and conscientious pre-filing investigation” prior to filing the claim. Armwood, 175 B.R. at 789. The court concluded that the fifth petition was filed to stay the repossession of Debtor’s car. The court imposed sanctions in the amount of \$500 on Debtor’s counsel. In addition, the court dismissed the case with prejudice and imposed a bar order against Debtor, prohibiting him from refileing any petition under Title 11 for a period of 180 days.

C. **Components of FRBP 9011**

1. Language Of The Rule Imposes The Following Duties Upon Lawyers:

a. Rule 9011(a) *Signature*. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. FED. R. BANKR. P. 9011(a).

b. Rule 9011(b) *Representations to the Court*. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an **inquiry reasonable** under the circumstances,--

(i) (1) it is not being presented for any **improper purpose**, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(ii) (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a **nonfrivolous** argument for the extension, modification, or reversal of existing law or the establishment of new law;

(iii) (3) the allegations and other factual contentions have **evidentiary support** or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(iv) (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. FED. R. BANKR. P. 9011(b).

2. How Are Rule 9011 Motions Initiated?

a. FRBP 9011(c)(1)(A). *By Motion*. 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 [Rule 9011(b)]. 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. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees. FED. R. BANKR. P. 9011(c)(1)(A).

b. FRBP 9011(c)(1)(B). *On Court's Initiative*. On its own initiative, the court may enter an order describing the specific

conduct that appears to violate [Rule 9011(b)] and directing an attorney, law firm, or party to show cause why it has not violated [Rule 9011(b)]. FED. R. BANKR. P. 9011(c)(1)(B).

3. Who Can Be Sanctioned?

a. Documents include petitions, pleadings, motions or other papers served or filed in a bankruptcy case. Kimberli A. Cary, Note and Comment, *The Arsenal of Sanctioning Powers at the Bankruptcy Court's Disposal*, 13 BANKR. DEV. J. 443, 460 (1997).

b. Sanctions can be imposed against the individual who signed the pleading as well as the client represented by the signer.

c. For situations in which the Debtor is an attorney, the courts have imposed a higher standard of inquiry and responsibility for Debtor's counsel. If the client is knowledgeable about bankruptcy law or shared responsibility with the attorney for litigation strategy, sanctions may be imposed upon the client and the attorney jointly and severally. *In re Armwood*, 175 B.R. 779 (Bankr. N.D. Ga. 1994) (citing *Caldwell v. Farris*, 136 B.R. 545, 554 (B.A.P. 9th Cir. 1992)). In *Armwood*, the court concluded that the Debtor, an attorney, "might reasonably be expected to provide more accurate information than the average debtor could" to his attorney and thus, the attorney would be prompted to conduct a more thorough investigation. *Id.* at 789.

d. Applies to *pro se* litigants as well. *In re Law Center*, 261 B.R. 607 (Bankr. M.D. Pa. 2001).

e. Rule 9011 and sanctions imposed pursuant to the inherent power of the court can reach an entire law firm. *In re Minniti*, 242 B.R. 843, 848 (Bankr. E.D. Pa. 2000).

4. What Satisfies the Requirement of Reasonable Inquiry?

a. The determination of whether an inquiry was reasonable is based on an objective standard of lawyerly performance. Thus, the court will not consider the subjective good faith argument of the attorney. *In re Harker*, 241 B.R. 357, 365 (Bankr. M.D. Pa. 1999).

b. Attorney has a duty under Model Rule of Professional Conduct 1.4(b) to investigate the official schedules attached to a bankruptcy filing.

(i) Counsel must engage in reasonable inquiry about the content of the debtor's schedules to determine their accuracy. False schedules, drafted by an associate of a

sanctioned attorney, are outside the scope of a Rule 9011 violation. However, they were not adequately reviewed by counsel and the court relied on its inherent power to impose fines against counsel. The court admonished counsel for his “zealous advocacy and ‘seat of the pants’ representation [that] has pushed the envelope far beyond the ethical limits.” In re Engel, 246 B.R. 784, 791 (Bankr. M.D. Pa. 2000).

c. “The reasonableness of an attorney’s inquiry focuses not on whether the claim was frivolous or not but whether the attorney conducted an adequate inquiry into the facts and law before filing it.” In re Bailey, 321 B.R. 169, 178 (Bankr. E.D. Pa. 2005).

d. If an attorney fails to conduct a reasonable legal inquiry into bankruptcy law, Rule 9011(b) has been violated even if the attorney holds a good faith belief that his client is entitled to relief under the law. In re American Telecom Corp., 319 B.R. 857, 872 (Bankr. N.D. Ill. 2004).

5. Crossing The Line Into An Improper Purpose—Bad Faith Filings.

a. Samples of improper purpose listed in Rule 9011(b)(1): petitions designed to harass, cause unnecessary delay or needless increase in the cost of litigation.

b. In re Nicola, 258 B.R. 329, 336 (Bankr. E.D. Pa. 2001). The Nicola court levied sanctions against the Debtor and his counsel for “actions . . . of bad faith, without color . . . made for reasons of harassment and delay” when the Debtor had filed a bankruptcy petition to delay litigation in which he was involved. The fines amounted to the award of attorney’s fees and expenses. Id. at 336. The Debtor and Debtor’s counsel admitted to the court that he had filed the petition solely to delay pending litigation against the Debtor and each had failed to appear at scheduled court hearings. The court asserted that each individual offense committed by Debtor and his counsel did not rise to an infraction of Rule 9011 as the “commencement of a bankruptcy case for the purpose of staying litigation is, in and of itself, not an act of bad faith.” Id. at 334. Taken as a whole, however, the court concluded it was an “invidious scheme.” Id. at 335. (On appeal, the United States District Court for the Eastern District of Pennsylvania reversed the decision in Nicola on procedural grounds. The court disallowed the imposed sanctions because the Rule 9011 motion had been filed after entry of final judgment. Nicola v. Piscitelli, 2001 U.S. Dist. LEXIS 24191, at *11 (E.D. Pa. 2001).)

6. Documents Not Supported By Law Or Well Grounded In Fact.
 - a. Sanctions can be imposed for bankruptcy petitions that are not supported by law or fact, however, many courts are reluctant to hamper efforts to extend the law as it “may hinder zealous advocacy and inhibit imaginative legal or factual approaches to applicable law and otherwise good faith attempts to reconsider settled doctrines.” Crawford Square Cmty. v. Turner, 2005 Bankr. LEXIS 1069 (Bankr. W.D. Pa. 2005).

7. Safe Harbor Provision.
 - a. FRBP 9011(c)(1)(A) allows for a “safe harbor provision,” which does not allow a filing for sanctions unless the challenged party has failed to correct or modify the challenged document within twenty-one days.

 - b. The safe harbor provision was added to FRBP 9011 in 1997 after the 1993 amendments to FRCP 11.
 - (i) The movant must allow the offending party to remedy the document. In re Engel, 246 B.R. 784, 789 (Bankr. M.D. Pa. 2000).

 - (ii) In Highgate Equities, the party moving for Rule 9011 sanctions sent a letter to the court and the non-moving party. The court did not find the notice adequate because it did not provide an opportunity for the attorney to remedy the charges. “The ‘notice’ and ‘reasonable opportunity to respond’ requirements of Rule 9011(c) reflect the importance of according fair procedural protections to an attorney or other party facing sanction.” In re Highgate Equities, Ltd., 279 F.3d 148, 152 (2d Cir. 2002).

D. Inherent Power of the Bankruptcy Court: 11 USCS § 105(a)

1. § 105. Power of court. (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

2. Bankruptcy courts, like other federal courts, have the inherent power to impose sanctions on those who appear before them to deter abuses of the judicial process. Chambers v. NASCO, 501 U.S. 32 (1991).

3. The failure to make a finding of a Rule 9011 violation does not prevent the court from asserting its inherent power to sanction. The use of the inherent power, however, requires a higher threshold and a finding of willful bad faith.

a. In re Engel, 246 B.R. 784, 789-90 (Bankr. M.D. Pa. 2000). The court sanctioned counsel for submitting “clearly inaccurate” schedules and emphasized that counsel’s numerous opportunities to review the filing demonstrated a “reckless disregard for the requirements of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.” Id. at 790. The sanctioned attorney had failed to disclose the Debtor’s ownership interest in a closed corporation. Counsel had filed an amendment to the schedules at the close of the case, but the court clerk refused the amendment. Although counsel represented the Debtor in the sale of this undisclosed ownership interest for \$50,000 the following day, the attempted amendment carried a negative book value for the stock interest without ever disclosing the fair market value of the stock. The court viewed this error as going beyond “mere negligence.” Id. at 792.

b. Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc., 57 F.3d 1215 (3rd Cir. 1995). The court used its inherent power to sanction a law firm and deny fees for its filing of improper claims when the court was unable to impose Rule 11 or Rule 9011 sanctions. The law firm, representing the Debtor, had filed a \$4,250,000 lawsuit against the counsel to the Official Committee of Unsecured Creditors, which the court deemed frivolous. The court concluded further that Debtor’s counsel “exhibited conduct of dishonesty, incompetency and gross mismanagement of the affairs of the Debtor.” Id. at 1222.

c. In re Johnson, 236 B.R. 510, 522 (DC Cir.1999) (“It is clear from the wording of Section 105 that Congress intended Bankruptcy Courts to have power to strike irrelevant arguments that only act as obstacles to determining a case on the merits.”).

E. Multiple Filings—28 USCS § 1927

1. §1927. Counsel's Liability for Excessive Costs. Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.

2. Unlike FRBP 9011, the court must conclude that there was an element of **willful bad faith** on the part of the attorney and its use is limited to more drastic instances of judicial abuse. In re Marker, 133 B.R. 340, 346 (Bankr. W.D. Pa. 1991).

3. Law firm and not just an individual attorney can be sanctioned under this power. In re Marker, 133 B.R. 340, 340 (Bankr. W.D. Pa. 1991).

F. Employment of Professional Persons: Disclosure of Connections under FRBP 2014

1. Professionals seeking employment by a debtor in possession must file an application seeking court approval of such appointment. The application must comply with specific disclosure requirements set forth in FRBP 2014 and must contain information including “to the best of the applicant’s knowledge, **all** of the person’s connections with the debtor, creditors, [and] any other party in interest.” FED. R. BANKR. P. 2014 (a).

2. Failure to fully disclose all connections can lead to the imposition of sanctions against attorneys and law firms. The follow cases demonstrate the power of the bankruptcy court to levy sanctions for nondisclosure:

a. In re Park-Helena Corp., 63 F.3d 877 (9th Cir. 1995). In Park-Helena, the attorneys failed to disclose that the retainer fee was paid by a party in interest. The court affirmed an order denying the entire fee request of \$150,000. Further, the Ninth Circuit stressed that “[e]ven a negligent or inadvertent failure to disclose fully relevant information may result in a denial of all requested fees.” Id. at 882.

b. In re Leslie Fay Co., 175 B.R. 525 (Bankr. S.D.N.Y. 1994).

(i) In Leslie Fay, Weil Gotshal & Manges (“Weil Gotshal”) was retained by a special audit committee of the Board of Directors of The Leslie Fay Companies, Inc. (the “Debtor”) to assist in the investigation of suspected accounting fraud. As the Debtor’s financial condition worsened, Weil Gotshal was asked to provide additional advice and ultimately was retained by the Debtor when it filed for chapter 11 protection.

Prior to its retention by the audit committee, Weil Gotshal had not represented the Debtor. Weil Gotshal, however, did represent a number of persons associated with the Debtor. Specifically, at the time of its retention, Weil Gotshal represented

Bear Stearns & Co. (“Bear Stearns”) and Odyssey Partners L.P. (“Odyssey”), two of whose principals were outside directors of the Board of Directors of the Debtor and members of the audit committee, as well as the Debtor’s independent auditor, BDO Seidman (“BDO”). Weil Gotshal also represented Forstman & Co., Inc. (“Forstman”), the Debtor’s seventh largest creditor.

Although required to disclose all “connections” to parties in interest under Fed.R.Bankr.P. 2014, Weil Gotshal failed to disclose its representation of any of those entities in its application for retention by the Debtor. Following the revelation of Weil Gotshal’s relationship to other parties in interest, the U.S. Trustee and the Creditors’ Committee filed a motion to disqualify Weil Gotshal and sought to deny the firm all of its previously allowed and accrued but unpaid fees.

The Bankruptcy Court (Chief Judge Tina L. Brozman) found that Weil Gotshal had violated FRBP 2014 by failing to disclose its connection to Bear Sterns, Odyssey, Seidman and Forstman. In re The Leslie Fay Co., Inc., 175 B.R. 525, 536 (Bankr. S.D.N.Y. 1994). Although the Bankruptcy Court did not disqualify Weil Gotshal, it did sanction counsel and required Weil Gotshal to disgorge approximately \$1 million in fees. Id. at 539.

G. Types of Sanctions

1. Rule 9011(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that [FRBP 9011(b)] has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated [Rule 9011(b)] or are responsible for the violation. FED. R. BANKR. P. 9011(c).
2. Mandatory Nature of the Rule.
 - a. Sanctions are mandatory when the court establishes a violation of Rule 9011. In re American Express, 132 B.R. 542, 545 (Bankr. W.D. Pa. 1991).
 - b. Rule 9011 applies an objective standard in its determination of a violation, however, the court can consider subjective factors in

setting the sanction for the violation. In re Marker, 133 B.R. 340, 340 (Bankr. W.D. Pa. 1991).

3. Monetary Sanctions.

a. Awarding of attorney's fees is **discretionary**—not mandatory. The imposition of sanctions under FRBP 9011 is a matter between the wrongdoer and the court and, therefore, parties filing motions for sanctions should not expect to receive attorney's fees as the normative appropriate sanction as would be the case under a fee-shifting statute. In re Geller, 96 B.R. 564 (Bankr. E.D. Pa. 1989).

b. Courts will consider an amount necessary to deter future violations and compensate the opposing party for fees that could have been avoided. In re Bailey, 321 B.R. 169, 183 (Bankr. E.D. Pa. 2005).

c. The deterrence motivation is to shatter the “all-too-widespread belief that a bankruptcy case is a panacea for state court litigation that has gone awry in spite of Congress’s limited intent for the bankruptcy regime.” In re American Telecom Corp., 319 B.R. 857, 874 (Bankr. N.D. Ill. 2004). In American Telecom, the court imposed attorney's fees in the amount of \$4,825 against the Debtor for filing a Chapter 7 petition for the sole purpose of delaying creditor's lawful collection efforts.

d. Examples of Monetary Fines:

(i) Marsch v. Marsch, 36 F.3d 825 (9th Cir. 1994). (Before a state court could enter a restitution judgment against Debtor in favor of her ex-husband-creditor, she filed a Chapter 11 petition. The court determined that it was a bad faith filing because Debtor had sufficient assets to satisfy the judgment. The court imposed sanctions of \$27,452 against the Debtor for attorney's fees and costs incurred by the creditor in challenging the bankruptcy petition).

(ii) Seneca Resources Corp. v. Moody, 35 BR 260 (S.D. Tex. 1991). (Debtor, who had filed a frivolous motion to recuse judge, was sanctioned under FRBP 9011 in the amount of \$252,760 to compensate for trustee's fees and costs relating to motion and for 284 hours spent by courts reviewing and ruling on motion. Litigant who files patently frivolous motions should expect to pay penalty

equal to at least costs incurred by those who must respond to the motions.)

(iii) In re Copeland, 268 B.R. 273 (Bankr. Kan. 2001). (Debtors had filed three successive bankruptcy petitions to stay three lawful foreclosure sales. The court found that the multiple bankruptcy filings on the eve of foreclosure sales constituted an abuse of the bankruptcy system. The court imposed a sanction of \$5,150.95, including attorney's fees incurred by the foreclosing creditors.)

4. Non-monetary Sanctions.

a. Courts again consider the deterrence effect of the imposition of sanctions.¹

b. Examples of Non-Monetary Sanctions:

(i) In re Bailey, 321 B.R. 169, 183 (Bankr. E.D. Pa. 2005) (ordering the sanctioned attorney to conduct a PACER search of every potential debtor's bankruptcy history prior to filing a bankruptcy petition on behalf of the Debtor).

(ii) In re Weaver, 307 B.R. 834 (Bankr. S.D. Miss. 2002) (ordering the sanctioned attorney to read FRBP 9011).

(iii) Also includes referral to disciplinary review boards and professional misconduct sanctions.

(a) Attorneys and their law firm were sanctioned for failing to meet with their clients—the Debtors—prior to filing the Debtors' bankruptcy petitions. The sanctioned attorneys did not conduct a reasonable inquiry into the petitions and the court cited their "total absence of professionalism." In re Rainwater, 124 B.R. 133, 141 (Bankr. M.D. Ga. 1991). The judge forwarded a copy of the order and

¹ A California law firm recently found itself at the receiving end of an unusual sanction for a Rule 11 violation. The law firm and the particular attorney were chastised by the court for presenting misstatements of the facts and delaying the resolution of the case. The judge ordered *all* of the firm's attorneys to attend six hours of CLE ethics training. The attorney involved in the case was ordered to attend 20 hours of CLE ethics training. The judge also sent a copy of the order to the California Bar Association. Moser v. Bret Harte Unified Sch. Dist., 366 F. Supp. 2d 944 (E.D. Ca. 2005).

record to the State Bar of Georgia for review by the Georgia Disciplinary Committee. Id. at 141.

(b) Attorney was sanctioned by public censure for presenting frivolous petitions to the bankruptcy court. The attorney was found to have violated Rule of Professional Conduct 3.1 for filing a frivolous claim to benefit his client. In re Anonymous No. 85 D.B. 97, 44 Pa. D. & C.4th 299, 309 (1998).

H. Examples of Sanctions

- a. FRBP 9011 requires that a creditor's allegations that the debt is nondischargeable be made in good faith. In re Saler, 205 B.R. 737, 746 (Bankr. E.D. Pa. 1997).
- b. Awareness of prior cases filed by Debtor should have prompted Debtor's attorney to engage in a thorough and conscientious pre-filing investigation. In re Armwood, 175 B.R. 779, 789 (Bankr. N.D. Ga. 1994).
- c. Example of Successive Filings—In re Bailey, 321 B.R. 169, 178 (Bankr. E.D. Pa. 2005). The court sanctioned the attorney who had filed the **tenth** Chapter 13 bankruptcy petition on behalf of the Debtor and/or her former husband. The court criticized the attorney for not reasonably researching the past filings of his clients. Further, the court commented that if the offending lawyer had "gathered accurate information before the filing, he would have seen that this case was legally unsupportable as well." Id. at 181.
- d. Creditor and Debtor had squabbled for years in state litigation and creditor secured a judgment against Debtor. Debtor, a Pennsylvania corporation, filed a Chapter 11 petition to stay the sale of the corporation's sole asset. The court found that the bankruptcy claim was filed to delay and harass creditor rather than to attempt a genuine reorganization—the corporation was not facing claims that "constitute[d] an actual, substantial danger to its economic viability... ." Cinema Service Corp. v. Edbee Corp., 774 F.2d 584, 586 (3d Cir. 1985).

II. Rule 11 and the Efforts to Hamper Groundless Litigation

A. Rule 11—Results of Federal Judicial Center Survey

1. In December 2004, the Federal Judicial Center conducted a survey of federal district judges about Federal Rule of Civil Procedure ("FRCP")

11 and a proposed amendment to the Rule. The proposed amendment included removing the safe harbor provision, proposals for mandatory sanctions, mandatory attorney fee awards, and the application of Rule 11 to discovery disputes. David Rauma & Thomas E. Willging, Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure (2005).

2. Some interesting results from the survey:
 - a. More than **80%** of 278 district judges indicated that Rule 11 is needed and just right as it stands now.
 - b. More than half of the judges (**55%**) indicated that the purpose of Rule 11 should be both deterrence and compensation.
 - c. Approximately **85%** of the judges viewed groundless litigation as a small problem.
 - d. Most of the respondents (**91%**) said that sanctions should not be required for all Rule 11 violations.

B. Recent Developments

1. The still pending Lawsuit Abuse Reduction Act of 2004, in an effort to further reduce the amount of groundless litigation, proposes amending Rule 11 as follows:
 - a. Impose mandatory, instead of discretionary, sanctions on violators of Rule 11.
 - b. Remove the safe harbor provision and the opportunity to withdraw the contested document.
 - c. "Three strikes rule" in which an attorney would be suspended for one year if the attorney has been sanctioned for a Rule 11 violation more than three times in his or her career.
 - d. Award the prevailing party with attorney's fees.
 - e. Allow for Rule 11 violations in the discovery stage.
2. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act") also has attempted to curb litigation abuse. Attorney liability will be affected dramatically by new attorney certification requirements under the Act as noted below:
 - a. Language of the Act:

§ 707(4)(C). The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—(i) performed a **reasonable investigation** into the circumstances that gave rise to the petition, pleading, or written motion; **and** (ii) determined that the petition, pleading, or written motion—(I) is well grounded in fact; and (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse.

§ 707(4)(D). The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

b. Some reactions and estimated effects of the legislation:

Increased Risk: Debtor’s counsel will be required to conduct more exacting investigations of the client’s financial history. Avoiding liability may include hiring “private investigators, appraisers and auditors to verify the value of client assets.” Marcia Coyle, *Debtor’s Attorneys See Red in Bankruptcy Bill: They See Malpractice Premium and Overhead Hikes*, N.J.L.J. (Mar. 21, 2005). Many attorneys have commented that certification of the client’s ability to repay is too risky and that they might leave the practice. *Id.* The certification requirement may leave counsel vulnerable for “sanctions over factual inaccuracies.” Editorial, *Bad Bankruptcy Bill*, 26 NAT’L L. J. 23 (Mar. 14, 2005). This new procedural certification imposes a more stringent duty of inquiry than Rule 9011 as discussed above; a lawyer must more thoroughly examine the financial history and the statements of the client. Letter from Robert D. Evans, ABA Director of Governmental Affairs, to Senate Judiciary Comm. 2 (Feb. 8, 2005).

Increased Expenses. One organization reported that 70% of people who file for bankruptcy do so under Chapter 7. With the increased paperwork and due diligence required of Chapter 7 debtor’s counsel, filing fees and attorney’s fees are expected to increase from 30 percent to 40 percent. NEA Member Benefits, Financial Awareness Bulletin: Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (May 2005). Many commentators have argued that it will deny many “low-income clients” the right to seek bankruptcy relief. Marcia Coyle, *Debtor’s Attorneys*

See Red in Bankruptcy Bill: They See Malpractice Premium and Overhead Hikes, N.J.L.J. (Mar. 21, 2005).

Increased Malpractice Insurance Expenses. Most malpractice carriers are not expected to cover this liability under current policies and thus may increase significantly malpractice premiums for extended coverage. Dara McLeod, *Malpractice Insurers Watching Impact of Bankruptcy Law*, KANSAS CITY DAILY RECORD (June 1, 2005).

c. Additional Liability. If a Chapter 7 trustee files a motion for dismissal on the basis of abuse and the court finds an abusive cause of dismissal of the case, then 11 U.S.C.A. § 707(b)(4) directs that a Rule 9011 standard is applied. If the court determines that the debtor's attorney violated the Rule, the court may sanction the attorney. The sanctions *may* amount to the reimbursement of the trustee's reasonable costs in prosecuting the motion, including the trustee's attorney's fees or a civil penalty. Hon. William Houston Brown & Lawrence R. Ahern III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS (Thomson/West 2005).