Coping in the '90s: The Demand on Illinois Litigators Under Supreme Court Rule 137

The adoption of Illinois Supreme Court Rule 137 signals a renewed commitment by the court to halt abuses of the court's processes. This article examines the demands of Rule 137 on Illinois litigators and provides guidance for avoiding sanctions.

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I. Introduction

The 1980's saw a revolution of sorts in the attitude of the courts and the profession toward lawyer conduct. Until the adoption of the 1983 amendments to the Federal Rules of Civil Procedure, the lawyer's duties to the court and other lawyers were secondary to the essentially unbridled obligation to provide "zealous advocacy." That advocacy spilled beyond the courtroom to dirty tricks in discovery, dilatory tactics, and a "file now, investigate later" mentality in drafting pleadings.

The pendulum has swung and the 1990s will continue to see courts aggressively enforcing rules like Rule 11 of the Federal Rules of Civil Procedure and the commands of ethical norms requiring lawyers to be civil and fair to opponents, candid with courts, and businesslike with clients.

In Illinois, the supreme court recently adopted Rule 137,[1] replacing section 2-611 of the Code of Civil Procedure.[2] Like Federal Rule 11, Rule 137 requires certification of pleadings and other papers filed with the court and provides for a broad range of sanctions against lawyers who abuse the court's processes. This article addresses the demands of Rule 137 on the Illinois litigator, paying particular attention to its impact on conduct which under prior court rules may have been accepted in the name of zealous advocacy, but which now runs a risk of heavy sanctions against the offending lawyer. Because of the relative newness of Rule 137, this article will chiefly refer to decisions under former section 2-611 and Rule 11 of the Federal Rules of Civil Procedure.

II. The Promulgation of Rule 137

Rule 137 is modeled after section 2-611 of the Illinois Code of Civil Procedure, which in turn adopted verbatim the key language of Rule 11 of the Federal Rules of Civil Procedure. The Rule provides that an attorney's signature on a pleading, motion, or other paper filed with the court constitutes a certification that the lawyer has 1) read the document and 2) conducted a reasonable inquiry into its basis, and that the document 3) is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and 4) is not interposed for any improper purpose, such as harassment, delay, or an unnecessary increase in cost of the litigation. Violation of any of these provisions may subject the party, the party's attorney, or both to a sanction which may include an order to pay the other party's attorney fees and costs.[3]

The only substantive differences between Rule 137 and former section 2-611 relate to the court's task upon finding a violation. Unlike Rule 11 and section 2-611, which provide for mandatory sanctions, Rule 137 provides that the trial court *may* impose a sanction, giving the court a broader measure of discretion.

Second, Rule 137 explicitly requires a judge ordering a sanction to "set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." This change was included to make sanctions easier to review.[4] Apart from these differences, the language of Rule 137 is substantially identical to Rule 11 and former section 2-611.

III. The Requirements of Rule 137

A. *Objective Standard*

Prior to 1986, a subjective bad faith

1. Ill Rev Stat ch 110A, ¶ 137 (1989).
2. Ill Rev Stat ch 110, ¶ 2-611 (1989).
3. *Chicago Title & Trust Co. v Anderson*, 177 Ill App 3d 615, 532 NE2d 595 (1st D 1988).
4. *Bertuli v Gaull*, 215 Ill App 3d 603, 574 NE2d 1390 (3d D 1991).

standard prevailed in Illinois for factual pleadings. This meant that an attorney violated section 2-611 only if he or she knew there was no good ground to support the pleading or it was brought in bad faith to harass an opponent.[5] By contrast, Rule 137 now requires an attorney to certify that he or she has read the document and made a reasonable inquiry into its basis, and that it is well grounded in fact and law. As a result, the Illinois Appellate Court held in *Cmarko v Fisher* that the rule now incorporates an objective standard of reasonableness.[6]

In *Cmarko*, the plaintiff sued for specific performance of a real estate contract, alleging that the defendant had orally accepted his offer to buy the property. However, the evidence disclosed that before the date of the alleged acceptance, the defendant's lawyer informed the plaintiff that his offer could not be accepted because of a contract with a third party. Moreover, the lawyer returned the plaintiff's offer with the defendant's signature deleted and the word "void" marked on it. The trial court ruled that the complaint was frivolous and assessed fees and costs against the plaintiff and his lawyer.[7]

On appeal, the lawyer argued that attorneys, as officers of the court, should be allowed "to exercise broad discretion *based upon their honest judgment* of the facts presented"; the court rejected this claim, stating that the lawyer "misconstrue[d] the statute."[8] The court held that the attorney's subjective opinion of the merits was irrelevant and that the court "must use an objective standard to determine whether a particular inquiry was reasonable, based upon the circumstances that existed at the time the pleading was filed."[9] Thus, the duties imposed under Rule 137 must be measured against an objective standard of reasonableness.

B. Reading the Document

The first duty imposed by Rule 137 is to read each pleading, motion, or other document before signing it, a requirement intended to prevent lawyers from disclaiming the contents of a document on the ground that it was prepared by an associate or referral counsel.[10]

C. Reasonable Inquiry

Second, Rule 137 imposes the duty to conduct a reasonable investigation into the facts and law supporting the pleading, motion, or other paper before filing such paper with the court. As stated by the Illinois courts, "counsel [and client] may not 'file now and investigate later.'"[11] Courts assess an investigation's reasonableness in light of the circumstances at the time the document was presented to the court, based on factors such as how much time for investigation was available, whether the signer had to rely on the client for information about the facts underlying the document, and whether the document was based on a plausible view of the law.[12]

Lawyers who must rely on information provided by the client must objectively review it to determine if it factually supports the client's claim. If the review reveals important discrepancies, inconsistencies, or gaps, the lawyer must investigate further before filing the paper with the court.[13] For example, in *Chicago Title & Trust Co. v Anderson*,[14] the court sanctioned an attorney who relied on the client even though circumstances suggested that the information was not trustworthy. The plaintiff filed a mortgage foreclosure action against the client, alleging that he was behind in his rent payments. The lawyer filed an answer denying the allegations based on the client's statements that his payments were current. In truth, however, the client was delinquent.

In affirming the trial court's imposition of sanctions, the appellate court held that reliance upon the client's statements was improper under the circumstances. The court reasoned that had the attorney complied with the requirements of section 2-611 and objectively assessed the client's inability to produce the requested documents, he would have realized that the client was in default before he filed the response to plaintiff's discovery requests.

On the other hand, Rule 137 does not expressly require that the signing lawyer personally inquire into the facts supporting the pleadings. Consequently, while conclusory state-

5. *Farwell Constr. Co. v Ticktin*, 59 Ill App 3d 954, 376 NE2d 621 (1st D 1978).
6. 208 Ill App 3d 440, 567 NE2d 352 (1st D 1990); see also *In re Marriage of Irvine*, 215 Ill App 3d 629, 577 NE2d 462 (4th D 1991).
7. *Cmarko*, 567 NE2d at 354.
8. Id, 567 NE2d at 355 (emphasis in original).
9. Id.
10. See *Zaldivar v City of Los Angeles*, 780 F2d 823, 830 (9th Cir 1986) ("The force of the rule is to eliminate the defense of personal ignorance of defects in a paper challenged as unmeritorious.").
11. *Chicago Title & Trust Co. v Anderson*, 177 Ill App 3d 615, 532 NE2d 595, 600 (1988).
12. Id, 532 NE2d at 600-01; See also Advisory Committee Notes to Federal Rule 11.
13. *Cmarko*, 567 NE2d at 355.

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Supreme Court Rule 137

(Continued)

ments from a client or another attorney, without more, cannot form a basis of a lawyer's Rule 137 certificate, examining the product of a reasonable inquiry conducted by others should be enough. Thus, at least one court has held that if the client furnishes facts that the attorney can reasonably believe, no further inquiry is required.[15]

Finally, the investigation required by Rule 137 must be performed for each allegation or denial in a pleading. The familiar tactic of including all "boiler plate" claims and defenses in a pleading now may trigger sanctions.[16] The important question is whether the investigation was performed, however, not whether the pleading is artfully drafted.[17]

D. Continuing Duty of Inquiry

Rule 137 does not expressly declare that a lawyer must amend or withdraw a paper if he or she learns after signing that it is unfounded or motivated by an improper purpose, and such a duty may not exist. The Advisory Committee Notes accompanying federal Rule 11 appear to impose no such duty, stating that "[t]he 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."[18] Several federal circuit court decisions have held that there is no continuing duty under Rule 11 to amend or withdraw papers later discovered to be unfounded.[19]

Other courts have stated, however, that a lawyer who learns after discovery that a complaint is unfounded must dismiss the meritless claims or risk sanctions. For example, in *Flip Side Productions, Inc. v Jam Productions, Ltd.*,[20] the seventh circuit upheld the trial court's decision to impose Rule 11 sanctions on a plaintiff who failed to dismiss a defendant after the close of discovery. According to the court, after the facts and law disclosed that the defendant was exonerated, the plaintiff had a duty to dismiss the defendant or "suffer the consequences."[21]

Illinois has apparently sided with the seventh circuit. In *Cmarko v Fisher*, the first district appellate court rejected the defendant's argument that his professional obligations ended upon filing the complaint, and that there was no continuing duty to re-evaluate the case during the pendency of the trial. The court stated in no uncertain terms that a lawyer has a professional duty to promptly dismiss a meritless lawsuit, even over the objections of the client, as soon as he or she learns "that the client has no case."[22]

E. Well Grounded in Fact

Rule 137 also requires the signing attorney to certify that the pleading, motion, or other paper is "well grounded in fact." Under the former version of section 2-611, sanctions were available only when the matters were pleaded in bad faith.[23] This is because the statute was viewed as penal, and an award of attorney's fees was appropriate only where the pleadings were "vexatious."[24] By contrast, Rule 137 imposes an objective standard of reasonableness; an attorney or party who in good faith files a document that is not well founded may be sanctioned.

The standard is met if the document has a "reasonable basis in fact."[25] On the other hand, a document is not well grounded in fact when there is no evidence to support an essential element of a claim,[26] or when an allegation is contradicted by irrefutable evidence that was or should have been known to the signing attorney.[27]

However, the purpose of Rule 137 is not to penalize the litigants "simply because they were not successful in the litigation."[28] Consequently, it is not per se unreasonable to initiate a lawsuit and pursue a possible claim where the defendant may have a strong defense; nor is it per se unreasonable to present a possible defense simply because the plaintiff may have a strong claim.[29]

Lawyers may not assert an unfounded claim or defense on the ground that they are merely acting upon their client's insistence that they do so. For example, in *In Re Caruso*[30] a lawyer for the respondent in a custody hearing filed papers with the court contesting the petitioner's pater-

14. 532 NE2d 595, 602.
15. *Couri v Korn*, 202 Ill App 3d 848, 560 NE2d 379 (3d D 1990).
16. See *Mary Ann Pensiero, Inc. v Lingle*, 847 F2d 90, 97 (3d Cir 1988) ("Although we acknowledge that the practice of 'throwing in the kitchen sink' at times may...merit Rule 11 condemnation, that threshold was not crossed in this case").
17. *Frantz v U.S. Powerlifting Federation*, 836 F2d 1063, 1068 (7th Cir 1987).

"[A]ny complaint, motion, or other paper filed in state or federal court must be supported by well-researched law and investigated facts. Lawyers should not rely solely on the statements of others about what the facts are, especially where circumstances suggest that those statements are untrustworthy."

18. 28 USCA Rule 11, advisory committee notes to 1983 amendments (1991 Supp).
19. E.g. *Hamer v Lake County*, 819 F2d 1362 (7th Cir 1987); accord *Thomas v Capital Security Services*, 836 F2d 866 (5th Cir 1988); *Oliveri v Thompson*, 803 F2d 1265 (2d Cir 1987); *Cunningham v County of Los Angeles*, 859 F2d 705 (9th Cir 1988).
20. 843 F2d 1024 (1988).
21. Id at 1036.
22. *Cmarko v Fisher*, 567 NE2d at 355; see also *Walter v Fiorenzo*, 840 F2d 427, 436 (7th Cir 1988) ("[W]here lengthy discovery and a series of dispositive motions reveal a factual or legal deficiency in a complaint against the defendant, the deficiencies should either be remedied or the defendant dismissed").
23. *Johnson v LaGrange State Bank*, 73 Ill 2d 342, 383 NE2d 185 (1978).
24. *Grandys v Spring Soft Water Conditioning Co.*, 101 Ill App 2d 225, 242 NE2d 454, 456 (2d D 1968).
25. *Tarkowski v Lake County*, 775 F2d 173, 176 (7th Cir 1985).
26. *MGIC Indemnity Corp. v Weisman*, 803 F2d 500 (9th Cir 1986).
27. *Adamson v Bowen*, 855 F2d 668 (10th Cir 1988) (agency decision denying petitioner's claim was so lacking in evidentiary support that agency's defense of such decision on appeal was frivolous).
28. *Prevendar v Thonn*, 166 Ill App 3d 30, 518 NE2d 1374, 1382 (2d D 1988).
29. *Whiting Corp. v Professional Employment, Inc.*, 186 Ill App 3d 705, 542 NE2d 829 (1st D 1989); see also *Hartman v Hallmark Cards, Inc.*, 833 F2d 117, 124 (8th Cir 1987) (court denied sanctions, noting that although the plaintiff "may have had a weak case and did not...prevail on the merits...her claims were not baseless").
30. 185 Ill App 3d 739, 542 NE2d 375 (1st D 1989).

nity despite irrefutable evidence that the petitioner was the child's father. The respondent herself certified the petitioner's paternity on the child's birth certificate and a blood test confirmed a 99.99 percent probability that he was the father. Despite this evidence, the lawyer proceeded with the action, believing that his client's denial of the petitioner's paternity of itself obligated him to seek a judicial determination.

The court disagreed, stating that the lawyer "misperceive[d] his professional obligation."[31] Affirming the trial court's decision to impose sanctions, the appellate court held that the lawyer had an obligation "to dissuade his client from pursuing specious claims, and thereby avoid possible sanctions by the court, as well as unnecessary costs of litigating a worthless claim."[32]

F. Warranted by Law

Former section 2-611 required that allegations and denials be made with "reasonable cause," but did not specify whether "reasonable cause" meant only that the pleading's factual allegations were well founded or also that its legal claims were colorable. A few cases suggested that "reasonable cause" required that a pleading must possess legal as well as factual merit.[33] Rule 137 now makes clear what the courts inferred from the old rule — that pleadings, motions, and other papers must be warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. This principle reaffirms the duty imposed by the old Code of Professional Responsibility.[34]

A pleading or motion is warranted by existing law if it addresses a question of first impression[35] or concerns

31. Id, 542 NE2d at 378.

32. Id, 542 NE2d at 379 (quoting *Mohammed v Union Carbide Corp.*, 606 F Supp 252, 261 (ED Mich 1985)).

33. *Farwell Constr. Co. v Ticktin*, 59 Ill App 3d 954, 376 NE2d 621 (1st D 1978), appeal after remand, 84 Ill App 3d 791, 405 NE2d 1051 (1st D 1980); *King v King*, 57 Ill App 3d 423, 373 NE2d 313 (2d D 1978).

34. Rule 7-102(a)(2) of the Illinois Code of Professional Responsibility provided that a lawyer shall not "knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by a good-faith argument for an extension, modification, or reversal of existing law."

35. *Nelson v Piedmont Aviation, Inc.*, 750 F2d 1234, 1238 (4th Cir 1984), cert denied, 471 US 1116 (1985).

Supreme Court Rule 137

(Continued)

an issue on which the law is unsettled.[36] By contrast, a pleading or motion may be unwarranted by existing law if it is contrary to well-settled precedent. For example, in *Eastway Constr. Co. v City of New York*,[37] the court held that the proscription against meritless lawsuits is violated when "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...."

Unfortunately, this standard gives little guidance to the trial lawyer who seeks to advance an argument or theory that has been rejected in the past. The court may view such an attempt on the one hand as zealously striving to improve the law through ingenious or innovative advocacy, or on the other as flogging a horse which the courts have already pronounced legally dead.[38] The prudent litigator should probably cite the controlling adverse authority and then either distinguish it or advocate a reversal, modification, or extension of the law.[39]

At least one court has suggested that the exception for arguing for change or modification of existing law may not apply in a diversity action where state law provides the rule of decision. This is so because under the *Erie* doctrine, "a federal court cannot properly stretch the established frontiers of state law."[40]

G. *Improper Purpose*

Under section 2-611, a party's dilatory tactics did not fall within the rule because they were not untrue statements in pleadings.[41] Rule 137, by contrast, now requires the signing attorney to certify that the pleading, motion, or other paper "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." This requirement creates a tension between the lawyer's duty of zealous representation and courts' desire to reduce frivolous claims, defenses, and motions. Attempts to balance these interests under Federal Rule 11 have thus far met with unsatisfactory results.[42]

Courts often infer improper purposes from the circumstances surrounding the filing of a pleading or motion. Persistence in pursuing a claim despite repeated adverse rulings, for example, may signal that the litigation is designed merely to harass an opponent or force him or her to incur unnecessary legal expenses. For example, in *Cannon v Loyola Univ. of Chicago*,[43] the seventh circuit affirmed an award of attorney's fees and costs against a party who filed 13 suits in 10 years against various universities that denied her admission to medical school. After an adverse ruling on the merits in favor of several of the schools, the plaintiff refiled essentially the same complaint based on a slightly different legal theory. The court held that such conduct demonstrated a clear intent to harass the defendants.[44]

"[L]awyers should continually review and re-evaluate their positions as a case develops and abandon claims or defenses as soon as they appear to be unfounded[, and] should dissuade clients from taking legal action where none is merited."

It is unclear in Illinois whether a lawyer or party can be sanctioned for filing a well-founded complaint for an improper purpose. The issue was raised but not decided in *Dyer v Zoning Bd. of Appeals of Arlington Heights*.[45] The federal courts, moreover, are split on the question. The majority hold that if the pleading or other paper is well grounded in fact and law it does not violate the "improper purpose" clause of Federal Rule 11 despite the subjective intent of the signing attorney.[46]

In contrast, the seventh circuit held in *Szabo Food Serv., Inc. v Canteen Corp.*[47] that if the pleading or other paper is filed for an improper purpose, Rule 11 is violated even though the document is objectively reasonable. In *Szabo*, the defendant appealed the trial court's denial of Rule 11 sanctions against a plaintiff who filed an obviously meritless complaint. In remanding to the district court for a redetermination on the propriety of sanctions, the seventh circuit instructed the court to inquire into the plaintiff's intent in filing the complaint:

> Much of [plaintiff's] brief in this court is devoted to a demonstration that it had an objectively sufficient basis for its claim of racial discrimination. Perhaps it can persuade the district court that it did, but this is not enough. Because Rule 11 has a subjective component as

36. *Davis v A.G. Edwards & Sons, Inc.*, 823 F2d 105 (5th Cir 1987); cf *Indianapolis Colts v Mayor of Baltimore*, 775 F2d 177, 182 (7th Cir 1985) ("[T]he fact that judges who have ruled on the merits of the pleadings disagree provides significant evidence that the pleading was not frivolous or unreasonable").

37. 762 F2d 243, 254 (2d Cir 1985), modified, 821 F2d 121 (2d Cir 1987), cert denied, 484 US 918 (1987).

38. Compare *Eastway Const Corp.*, 762 F2d 243, 254 (court stated that "[v]ital changes had been wrought by those members of the bar who had dared to challenge the received wisdom"), with *Szabo Food Serv., Inc. v Canteen Corp.*, 823 F2d 1073, 1080 (7th Cir 1987) (defendant's failure to recognize controlling precedent characterized as an "ostrich-like tactic of pretending that potentially dispositive authority against the litigant's contention does not exist").

39. See *Thornton v Whal*, 787 F2d 1151, 1154 (7th Cir 1986) (court seems to suggest that "accurately describ[ing] the law and then call[ing] for [a] change" would be within the bounds of vigorous advocacy, assuming that the call was put to "the right forum in which to request a change...."). But see *Golden Eagle Distrib. Corp. v Burroughs Corp.*, 801 F2d 1531, 1540 (9th Cir 1986) (counsel not required to differentiate in legal briefs between a good faith argument for the extension, modification, or reversal of existing law and a position already warranted by existing law because to do so would "create a conflict between the lawyer's duty zealously to represent his client...and the lawyer's own interest in avoiding rebuke").

40. *Lind-Waldock & Co. v Caan*, 121 FRD 337, 343 n7 (ND Ill 1988).

41. *Dulin, Thienpont, Potthast & Snyder, Ltd. v Packaging Personified, Inc.*, 89 Ill App 3d 647, 411 NE2d 1173 (1st D 1980).

42. See generally Melissa L. Nelken, *Has The Chancellor Shot Himself In The Foot? Looking For A Middle Ground On Rule 11 Sanctions*, 41 Hastings LJ 383 (1990).

43. 784 F2d 777 (7th Cir 1986).

44. Id at 782.

45. 179 Ill App 3d 294, 534 NE2d 506 (1st D 1989).

46. See *Rachel v Banana Republic, Inc.*, 831 F2d 1503, 1508 (9th Cir 1987) ("[A] complaint that is well-grounded in fact and law cannot be sanctioned regardless of counsel's subjective intent"); *Carlton v Jolly*, 125 FRD 423, 427 (ED Va 1989) ("[A party's motives] do not serve to make a legally and factually acceptable pleading sanctionable").

47. 823 F2d 1073 (7th Cir 1987).

well, the district court must find out why [plaintiff] pursued this litigation.[48]

Given the plain language of Rule 137, it would seem that even meritorious litigation, if pursued to harass or for other improper reason, violates the lawyer's duty under Rule 137.

H. Appropriate Sanctions

Rule 137 explicitly authorizes the court to impose "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 is usually the case with fee awards, a "reasonable" award is not necessarily the actual expenses and fees, but those that the court considers reasonable.[49] "[S]anctions are not intended to make a moving party 'whole' for any and all damages....Rather, the court's focus is....what is needed to deter such conduct in the future...."[50]

Sanctions may be imposed sua sponte or on the motion of a party.[51] In *Thomas v Capital Security Serv.*,[52] the fifth circuit stated that the sanction imposed "should be the least severe sanction adequate to the purpose of" the Rule. The court mentioned various sanctions that a court might choose to impose, including "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."[53]

Beyond awarding attorneys' fees and costs in Rule 11 cases, federal courts have also imposed a fine analogous to a penalty for criminal contempt,[54] dismissed the offending pleading,[55] reprimanded the attorney in a published opinion and ordered that a copy of the opinion be distributed to all members of the attorney's firm,[56] suspended the attorney,[57] enjoined the party from bringing new suits until outstanding awards have been paid,[58] required the litigants to pay sanctions from an earlier case before instituting a subsequent one,[59] and imposed other sanctions.

I. Duty to Mitigate

There is substantial authority in the federal case law for the proposition that the party opposing a pleading or motion that violates Rule 11 has an

48. Id at 1083.
49. *Kennedy v Miller*, 221 Ill App 3d 513, 582 NE2d 200 (2d D 1991).
50. *Chris & Todd, Inc. v Arkansas Dept. of Finance & Admin.*, 125 FRD 491, 493-94 n1 (ED Ark 1989).
51. *Kennedy*, 582 NE2d at 208.
52. 836 F2d 866, 878 (5th Cir 1988).
53. Id.
54. *In Re Yagman*, 796 F2d 1165, 1180-81 (9th Cir 1986), cert denied, 484 US 963 (1987).
55. *B & B Trading Corp. v Thorpe*, No 88-C-6300, Slip op (ND Ill, Sept. 26, 1988) (court struck pleading sua sponte to save opposing counsel the time and work of responding).
56. *Larkin v Heckler*, 584 F Supp 512, 514 (ND Cal 1984).
57. *In Re Disciplinary Action of Boucher*, 897 F2d 869 (9th Cir 1988), mod 850 F2d 597 (9th Cir 1988) (on rehearing, suspension was lifted due to mitigating factors).
58. *Stelly v Comm'r of Internal Revenue*, 808 F2d 442 (5th Cir 1987), cert denied, 480 US 907 (1987).
59. *Young v Kunde*, 698 F Supp 163 (ED Wis 1988).
60. E.g. *Dubinsky v Owens*, 849 F2d 1034, 1038 (7th Cir 1988) (because party failed to alert court and offending party of a possible Rule 11 violation, district judge erred in awarding entire fees and costs incurred in defending litigation).

Supreme Court Rule 137

(Continued)

obligation to mitigate its attorney fees and costs.[60] Thus, when a party believes that a pleading or motion filed by opposing counsel violates Rule 11, the party should properly notify the court and opposing counsel before incurring unnecessary expenses. Notice may be in the form of a "personal conversation, an informal telephone call, a letter, or a timely Rule 11 motion."[61]

On the other hand, in a strongly worded opinion, Chief Judge Richard Curry of the Chancery Division of the Circuit Court of Cook County has rejected the notion of a duty to mitigate costs in responding to a frivolous pleading, writing as follows:

> Just what exactly is the proper level of response from an attorney whose client is being victimized by a careless, untrue or vexatious claim? Plaintiffs here argue that opposing counsel has a duty to mitigate the process abuser's potential for damages. Nonsense. The proper response to malicious prosecution or careless lawyering is *not* to respond in-kind with slovenly preparation or half-hearted advocacy; is *not* to "go easy" on those who wrongly use the courts; is *not* to leave it to the court and hope that the judge will somehow ferret out the latent falsity or baselessness of the pleadings. The proper response is to validate our profession's righteous outrage and indignation over such conduct with meticulous research, careful analysis, expansive writing and aggressive advocacy. The last thing which opposing counsel should be considering is how best to mitigate the burden on those who wrongly place his client in jeopardy and needlessly clog the courts. It is the process abuser who risks being burned by putting the fat in the fire — he cannot be heard to complain when his adversary stokes the flame.[62]

J. *Who May Be Sanctioned*

Like Rule 11, Rule 137 provides that if a pleading, motion, or other paper is signed in violation of the rule, the court may impose an appropriate sanction on "the person who signed it, a represented party, or both." Despite this language, until recently there was some debate about whether a represented party who signed a pleading or other paper could be liable for sanctions. The U.S. Supreme Court put the debate to rest with regard to the federal rule in *Business Guides, Inc. v Chromatic Communications Enter.*[63]

In *Business Guides*, the plaintiff corporation filed an action for copyright infringement and unfair competition against a rival publisher of trade directories, claiming that the defendant lifted several listings from the plaintiff's publications. The corporation also filed an application for a temporary restraining order (TRO), which was signed by the plaintiff's president. Affidavits supporting the TRO application alleged that 10 "seeds" — bits of false information deliberately planted in the plaintiff's listings to trap infringers — had been identified in defendant's directory. In truth, however, nine of the 10 listings contained no incorrect information.

"[L]awyers should be wary of signing their names to the product of somebody else's work. At the very least, they should read the documents before signing and satisfy themselves that the arguments have a reasonable basis in fact and law."

After concluding that the complaint and TRO application were baseless, the district court imposed monetary sanctions against the corporation on the ground that it failed to make a reasonable inquiry before its president signed the offending papers. The ninth circuit court affirmed. Business Guides then appealed to the Supreme Court, arguing that because a represented party's signature was not *required* on papers filed with the court, the president's signature did not trigger the certification standard of Rule 11.

The Supreme Court flatly rejected this argument, observing that following it would allow a represented party to sign frivolous or vexatious documents with impunity. The Court held that the certification requirement mandated that "all signers [must] consider their behavior in terms of the duty they owe to the court system to conserve its resources and avoid unnecessary proceedings."[64]

On the other hand, officers or employees of an organization who do not sign papers filed with the court are not personally subject to an attorney's fee award, even if they were the source of false statements upon which the award was predicated.[65] This is because they are not "part[ies]" to the litigation or attorneys of record; hence, their actions are beyond the scope of the Rule.

In *Monco v Janus*,[66] the Illinois Appellate Court addressed the issue of whether the phrase "person who signed" limits the persons against whom Rule 137 sanctions may be imposed to the signing attorney, or whether the law firm may also be sanctioned. Following the approach of the federal courts under Rule 11, the court concluded that only the attorney who actually signs the pleading is liable, even though he or she signs on the firm's behalf.[67] However, a proposed amendment to Rule 11 would specifically make law firms liable for sanctions if found responsible for a violation of the Rule.[68]

Local counsel who signs and submits a pleading or motion which violates Rule 137 is subject to sanctions, even though the document was prepared by another lawyer. For example, in *Coburn Optical Indus., Inc. v Cilco, Inc.*,[69] the court assessed sanctions against local counsel who signed the offending paper as well as against the defendant and its lead counsel.

61. *Thomas v Capital Sec. Serv.*, 836 F2d 866, 880 (5th Cir 1988).
62. *Singer v Brookman*, No 88 CH 9499, slip op at 4 (Chancery Div Cir Ct Cook County, August 29, 1989).
63. No 89-1500 (LEXIS, Genfed library, US file).
64. Id at 8.
65. *Plainfield School Dist. No. 202 v Lindblad Constr. Co.*, 174 Ill App 3d 149, 528 NE2d 996, 999 (3d D 1988).
66. 222 Ill App 3d 280, 583 NE2d 575 (1st D 1991).
67. Id, 583 NE2d at 587.
68. Proposed amendments to the Federal Rules of Civil Procedure, 137 FRD 53, 76 (1991).
69. 610 F Supp 656 (MDNC 1985).

The court ruled that "the lawyer who elects to sign a paper [must] take responsibility for it, even if that responsibility is shared."[70] The court also volunteered the following warning to all local counsel: "Rule 11 makes it advisable for attorneys acting as local counsel to consider the extent to which they can perform the role of a passive conduit consistent with the responsibilities imposed by Rule 11."[71]

In the Northern District of Illinois, local counsel is not required to handle any substantive aspects of the litigation or sign a pleading, motion, or other paper.[72] The purpose of this amendment appears to be to relieve local counsel of Rule 11 responsibility so long as he or she does not sign the document.

IV. Avoiding Rule 137 Sanctions

Given the breadth and volume of the cases interpreting Rule 137 and its counterpart under the federal rules, it is virtually impossible to provide a simple yet comprehensive guide for avoiding sanctions. However, some basic guidelines can be derived from the rule and the cases decided under its predecessors.

First, any complaint, motion, or other paper filed in state or federal court must be supported by well-researched law and investigated facts. Lawyers should not rely solely on the statements of others about what the facts are, especially where circumstances suggest that those statements are untrustworthy.

Second, lawyers should continually review and re-evaluate their positions as a case develops and abandon claims or defenses as soon as they appear to be unfounded. Lawyers should dissuade clients from taking legal action where none is merited.

Third, any argument for the modification, extension, or reversal of existing law should be clearly labeled as such and must be reasonable. Adverse precedent must be acknowledged, followed by a reasoned argument why adverse decisions are wrong or should be overturned.

Finally, lawyers should be wary of signing their names to the product of somebody else's work. At the very least, they should read the documents before signing and satisfy themselves that the arguments have a reasonable basis in fact and law. They should Shepardize the drafter's principal authorities and, where necessary, verify important facts independently. For their part, law firms should implement procedures that encourage compliance with Rule 137 and its federal counterpart.

70. Id at 660.

71. Id at n7; see also *Long v Quantex Resources, Inc.*, 108 FRD 416, 417 (SDNY 1985) ("[A]t the very least, a local counsel that signs the papers of a foreign counsel must read the papers, and from that have a basis for a good faith belief that the papers...appear to be warranted by the facts...and are not interposed for any improper purpose").

72. General Rule 3.13(c), United States District Court, Northern District of Illinois (Amendment February 29, 1988).