

II. Present Situation:

Frivolous and Vexatious Litigation

Over the years, many judges, attorneys, and legal commentators have continued to complain that frivolous and vexatious litigation unnecessarily congests both state and federal court dockets.¹ Some civil actions may be merely nuisance actions that litigants initiate not to seek redress for legitimate claims, but to coerce other litigants to make favorable economic settlements.² Most believe that courts must take action to eliminate litigation that serves no purpose other than to erode judicial efficiency and impede the progress of justice.³ To that end, “[l]egislative and judicial bodies at the federal and state levels have spun a web of statutes and procedural rules allowing courts to impose substantial sanctions against those who sponsor frivolous litigation.”⁴

Federal Rule 11 Sanctions

In federal cases, the primary method of deterring and punishing frivolous litigation conduct is through use of Rule 11, Federal Rules of Civil Procedure.⁵

Representations to the Court

Under Rule 11, by presenting to the court a pleading, motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge:

- It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in cost of litigation;
- The claims, defenses, and other legal contentions 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;
- The allegations and factual contentions have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- The denials of factual contentions are warranted on the evidence or are reasonably based on a lack of information or belief.⁶

Motion and Safe Harbor Provision

If the court determines that a violation of the Rule 11 provisions has occurred, the court may award sanctions.⁷ However, there is a 21-day safe harbor provision to allow violations of the rule

¹ Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1068 (1994).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Erin Schiller and Jeffrey A. Wertkin, *Frivolous Filings and Vexatious Litigation*, 14 GEO. J. LEGAL ETHICS 909, 910 (2001).

⁶ Fed. R. Civ. P. 11(b).

⁷ Rule 11 provides that the available sanctions do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the rules governing discovery. Fed. R. Civ. P. 11(d). Furthermore, an award of attorney’s fees

to be withdrawn or corrected by an attorney.⁸ An aggrieved party must serve, but not file, a motion alleging these violations on the party. If the violating pleading is withdrawn or corrected within 21 days from service of the motion, no sanctions will be awarded by the court under the rule. If the party refuses to withdraw or correct the pleading, the aggrieved party may file the motion for sanctions with the court. Thereafter, if the court determines that a violation has occurred, the court can award sanctions, including attorney's fees and costs.

Limitations on Sanctions

Under Rule 11, a sanction imposed for violations must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.⁹ Rule 11 specifies that the court may also, on its own initiative, award sanctions for any violation of the rule.¹⁰ However, the rule provides that a court may not award monetary sanctions on its own initiative unless the court issues an order to show cause before a voluntary dismissal or settlement of the claims is made.¹¹ In addition, the court may not award monetary sanctions against a represented party for violations premised upon pleadings that are not warranted by existing law.¹²

Florida's Sanction Statute

Existing law provides the statutory framework for pursuing sanctions against both an opposing party and possibly his or her attorney for initiating or refusing to withdraw frivolous claims and defenses, or pursuing intentional delays in litigation.¹³ The purpose of the statute is to "discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing the price tag of attorney's fees awards on the losing parties."¹⁴

Award of Attorney's Fees

Under the statute, upon the court's own initiative, or by the motion of any party, the court will award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney if the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense:

- Was not supported by the material facts necessary to establish the claim or defense; or

under the rule is not limited to successful parties, although a successful party is obviously more likely to be entitled to such fees. *Gordon v. Heimann*, 715 F.2d 531 (11th Cir. 1983).

⁸ Fed. R. Civ. P. 11(c)(1)(A).

⁹ Fed. R. Civ. P. 11(c)(2).

¹⁰ Fed. R. Civ. P. 11(c)(1)(B).

¹¹ Fed. R. Civ. P. 11(c)(2)(B). The Comment to Rule 11 notes that "parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case."

¹² Fed. R. Civ. P. 11(c)(2)(A). The Comment to Rule 11 notes that monetary responsibility for pleadings based upon frivolous application of law is more properly placed solely on the party's attorney. However, the Comment provides that "this restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings."

¹³ Allison S. Miller-Bernstein, *A Survey of Section 57.105, Florida Statutes: Effective Use of This Powerful Statute and How to Avoid Its Consequences*, 25 TRIAL ADVOC. Q. 10, 10 (2006).

¹⁴ *Id.* (citing *Murphy v. WISU Props., Ltd.*, 895 So. 2d 1088, 1093 (Fla. 4th DCA 2004)).

- Would not be supported by the application of then existing law to those material facts.¹⁵

In practice, the different types of frivolous and vexatious claims that may emerge in a civil action include:

- A lawsuit that has no merit when filed;
- A particular claim or defense that has no merit when filed; and
- A claim or defense that discovery reveals has no merit.¹⁶

Once it is determined that these particular claims or defenses lack merit, a party has a duty to dismiss the frivolous claim or defense, or risk exposure to an award of attorney's fees.¹⁷

Limitations on Sanctions

A losing party's attorney may not be responsible for sanctions if he or she acted in good faith, based upon the representations of his or her client.¹⁸ In addition, an attorney or his client may not be responsible for sanctions if the court determines that a claim or defense was initially presented as a good faith argument for the extension, modification, or reversal of existing law or the establishment of a new law.¹⁹ If the court determines that a party has been forced to participate in actions that were taken for the primary purpose of unreasonable delay, the court may award sanctions, including attorney's fees and other losses resulting from the improper delay.²⁰

Safe Harbor Provision

Similar to Federal Rule of Civil Procedure 11, the Florida statute contains a 21-day safe harbor provision.²¹ An aggrieved party must serve the motion for sanctions on the opposing party. If the opposing party does not withdraw or correct the claim within 21 days, the aggrieved party may file the motion and seek all available sanctions.

Florida Rules of Professional Conduct

In addition to statutory duties to refrain from filing frivolous activity in litigation, attorneys also have ethical duties to refrain from such activity. The Florida Rules of Professional Conduct reinforce the objectives of the Florida sanction statute, and may also serve to preclude and deter frivolous and vexatious litigation in Florida courts. Under Rule 4-3.1:

¹⁵ Section 57.105(1), F.S. These sanction provisions also apply in administrative proceedings under ch. 120, F.S. Section 57.105(5), F.S.

¹⁶ Miller-Bernstein, *supra* note 13, at 12.

¹⁷ *Id.*

¹⁸ Section 57.105(1), F.S.

¹⁹ Section 57.105(2), F.S.

²⁰ Section 57.105(3), F.S.

²¹ Section 57.105(4), F.S.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.²²

The Comment to this rule provides that an advocate has a duty to use legal procedure for the fullest benefit of a client, but also must refrain from abusing legal procedure. An action may be deemed frivolous if:

the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or 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.²³

Disciplinary proceedings may be initiated for violations of an attorney's ethical duty to refrain from frivolous actions, and an offending attorney may be subject to discipline such as suspension, probation, or public reprimand.²⁴

III. Effect of Proposed Changes:

The bill amends the current attorney's fee sanction statute for frivolous claims, unsupported defenses, and sham appeals. The bill adds two exceptions from the award of monetary sanctions under the statute which are similar to the federal sanction provisions contained in the Federal Rules of Civil Procedure. Additionally, the bill reorganizes the statute for clarity.

Exception for Represented Parties

Under the bill, represented parties are no longer subject to monetary sanctions for claims or defenses that would not be supported by the application of then-existing law to the material facts. This exception is identical to the federal provision. In practice, a party represented by counsel may no longer be responsible for frivolous misapplications of the law by the attorney. Although not expressly provided in the bill, it appears that the explicit reference to "monetary sanctions" indicates that such a party may remain subject to other sanctions such as dismissal of claim or defense, or the introduction of an amended pleading to counter the frivolous pleading.

Exception for Dismissed or Settled Claims

Under existing law, a court may award sanctions on its own initiative at any time. The bill restricts this ability by providing an exception that a court may only award monetary sanctions on its own initiative under the statute if that award is made before a voluntary dismissal or settlement of the claims by the party to be sanctioned. This restriction is substantially similar to the federal provision. However, under federal Rule 11, the power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. Rule 11 provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty

²² Fla. R. Prof. Con. 4-3.1.

²³ Fla. R. Prof. Con. 4-3.1, Comment.

²⁴ See *The Florida Bar v. Thomas*, 582 So. 2d 1177 (Fla. 1991).

payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant.²⁵

The bill's change to current law reinforces the purpose of the 21-day safe harbor provision of encouraging dismissal or withdrawal of frivolous filings prior to sanctions, by precluding courts from awarding sanctions on their own initiative after a party has withdrawn, corrected, or settled a frivolous claim. Furthermore, parties who choose to settle a case will not subsequently be faced with an unexpected sanctions order from the court which may have influenced their decision to settle a claim.

Effective Date

The bill provides an effective date of July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Individuals who retain legal counsel may no longer be personally liable for frivolous misapplications of the law by their counsel. In addition, persons who voluntarily withdraw or dismiss frivolous claims and defenses may no longer be subject to sanctions.

C. Government Sector Impact:

The Office of the State Courts Administrator reports that the courts will only initially encounter modest procedural delays as attorneys and litigants adjust to the new exceptions, and reports no fiscal impact on the judiciary.

²⁵ Fed. R. Civ. P. 11, Comment.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 26, 2010:

The committee substitute:

- Removes the provision in the bill which provided that, in cases where a voluntary dismissal is entered after the court has placed a party on notice that it may impose sanctions, the court may order sanctions notwithstanding the filing of the voluntary dismissal by the party subject to the sanctions; and
- Eliminates a represented party's ability to be subject to sanctions even if he or she knew of the lack of a legal basis for a particular claim or defense.

- B. **Amendments:**

None.