

Motion in Limine for Federal Rule of Civil Procedure 11

Memorandum

VAWA Confidentiality and Federal Civil Procedure Rule 11 Violations¹

Discussion

The Federal Rule of Civil Procedure Rule 11 provides for the striking of pleadings and the imposition of disciplinary sanctions on attorneys or pro se litigants who abuse the signing of pleadings. Specifically, Rule 11(b)(1) provides that an attorney or pro se litigant presenting to the court a pleading, written motion, or other papers, certifies to the attorney's best knowledge that the claims, defenses, and other legal contentions are not meant to harass, cause unnecessary delay or increase the cost of litigation.

And further, Rule 11(b)(2) provides that an attorney or pro se litigant presenting to the court a pleading, written motion, or other papers, certifies to the attorney's best knowledge that 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.

An attorney or pro se litigant is considered to be presenting to the court when the attorney signs, files, submits, or later advocates a pleading, written motion, or other paper. Fed.R.Civ.P. 11(b). The sanctions for an attorney or pro se litigant violating Rule 11 can be instituted on the court's initiative, or by motion. Fed.R.Civ.P. 11(c)(1). The procedure for filing a motion for Rule 11 sanctions includes a "safe harbor" of twenty-one days between the service of the motion and its filing with the court, so that the individual who has allegedly violated Rule 11 has twenty-one days to retract the statement. Fed.R.Civ.P. 11(c)(1)(A). Due to the nature of Rule 11 being a remedy deterring malicious behavior, rather than enriching the aggrieved party, the penalties include economic and direct costs only. Fed.R.Civ.P. 11(c)(2). Monetary sanctions are allowed for all Rule 11 violations, except Rule 11(b)(2) frivolous argument violation. Fed.R.Civ.P. 11(c)(2)(A).

¹ Developed by Michael Lyons and Darcy Paul, Morgan Lewis and Bockius, LLP

Rule 11 was promulgated to limit abuses and bad faith acts by attorneys and pro se litigants in court. Tarkowski v. County of Lake, 775 F.2d 173, 175-176 (7th Cir. 1985). Rule 11 applies only to assertions contained in papers filed with or submitted to the court. This Rule does not cover matters arising for the first time during oral presentations to the court, where counsel or pro se litigant may make statements that would not have been made if there had been more time to study and reflect. However, the sanctions of Rule 11 take effect when the attorney or pro se litigant advocates or reaffirms to the court a position contained in a pleading after learning that the position ceases to have merit. Adv. Com. Notes Fed.R.Civ.P. 11.

To protect the clients of advocates or attorneys working with immigrant victims of violence during civil trials, the advocates or attorneys may take advantage of either:

(1) Rule 11(b)(1) and argue that threats of deportation or criminal action during a civil trial constitute harassment, cause unnecessary delay, or increase the cost of litigation; See People v. Wickes, 112 A.D. 39, 49 (S.Ct. N.Y. App. Div., 1906) citing People v. Eichler (75 Hun 26, 26 N.Y.S. 998; appeal dismissed, 142 N.Y. 642) (holding that an attorney who threatens criminal prosecution to a person involved in the same civil case commits moral turpitude, and the attorney's belief in the person's guilt is no defense, and not even a mitigating factor); or

(2) Rule 11(b)(2) and argue that threatening deportation or criminal actions in a civil trial is not warranted by existing law, or constitutes a frivolous argument to change the law or propose new law. See In re Hart, 131 A.D. 661, 666-667 (S. Ct. N.Y. App. Div., 1st Dept, 1909) (holding that threatening criminal prosecution in order to force a settlement of a civil action is illegal, improper and unprofessional; a threat for criminal prosecution may even be disguised under a friendly veil, but the court analyzes the intent to induce the other side to act in a certain manner in the civil case).

Conclusion

Advocates or attorneys for immigrant victims of violence have two courses of action in a situation where the opposing counsel is making threats of deportation or criminal prosecution during or before a civil trial. Such threats are generally considered to be a crime, or at the minimum, a malicious behavior, and can qualify as a harassment or exertion of undue influence to fulfill the elements either Rule 11(b)(1) or (2). In such instances of receiving threats of deportation or criminal prosecution issued against their clients, advocates or attorneys representing immigrant victims of violence may serve a Rule 11 motion, and if the opposing

counsel or pro se litigant has not retracted his/ her words in twenty-one days, the advocates or attorneys may file the motion and qualify for restitution. However, for proper delivery of a Rule 11 motion, the advocates or attorneys must determine whether the threat in a particular case can be interpreted as a harassment or a frivolous representation in front of the court. This determination must be made on a case-by-case basis.

Motion in Limine for Federal Rule of Civil Procedure 11 starts on top of next page.²

² Developed by Michael Lyons and Darcy Paul, Morgan Lewis and Bockius, LLP and Soraya Fata, Legal Momentum

[INSERT COURT NAME AND JURISDICTION]

[INSERT NAME OF PLAINTIFFS])
)
 Plaintiffs,)
)
 v.) Civil Action No. [DOCKET NUMBER]
)
 [INSERT NAME OF DEFENDANTS])
)
 Defendants.)
_____)

PLAINTIFFS' *MOTION IN LIMINE* TO STRIKE THE DEFENDANTS' PLEADINGS, MOTIONS, AND ADVOCACY FOR PLEADINGS AND MOTIONS FOR VIOLATION OF FEDERAL RULE OF CIVIL PROCEDURE 11

Through their undersigned counsel, Plaintiffs hereby move to strike the Defendants' pleadings for violating the Federal Rule of Civil Procedure 11 (hereinafter "Rule 11"), on the grounds that Rule 11 provides for striking of Defendants' pleadings and advocacy of pleadings that seek to harass, cause unnecessary delay, increase the cost of litigation, or set forth frivolous contentions of law. Plaintiffs have attached a Memorandum in Support of the Plaintiffs' *Motion In Limine* that outlines the grounds for their motion.

Respectfully submitted,

/s/
[NAME
TITLE
CONTACT INFORMATION]

[INSERT COURT NAME AND JURISDICTION]

[INSERT NAME OF PLAINTIFFS])	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. [DOCKET NUMBER]
)	
[INSERT NAME OF DEFENDANTS])	
)	
Defendants.)	
)	

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’ *MOTION IN LIMINE* TO STRIKE
THE DEFENDANTS’ PLEADINGS, MOTIONS, AND ADVOCACY FOR
PLEADINGS AND MOTIONS FOR VIOLATION OF
FEDERAL RULE OF CIVIL PROCEDURE 11**

I. INTRODUCTION

The Defendants’ pleadings and advocacy for their pleadings that seek to threaten deportation or criminal sanctions in a civil trial should be excluded and stricken from the record on the grounds that such pleadings, advocacy of such pleadings, and motions that violate Rule 11.

Rule 11 was promulgated to prevent abuses, acts of bad faith, and punish violations of conduct in the signing and advocacy of pleadings and motions, whether by an attorney or a pro se litigant. An abuse, an act of bad faith, or violation of conduct can be inferred from behavior that harasses, causes unnecessary delay, increases the cost of litigation, or presents frivolous legal contentions.

The Defendants may not threaten deportation or criminal sanctions to the Plaintiff due to the abusive, harassing and intimidating nature of doing so in a civil trial, and due to the bad faith and frivolous nature of conduct in making an argument for an unlawful contention of law.

For the reasons detailed below, this Court should strike the Defendants' pleadings, advocacy of such pleadings, and motions that violate Rule 11.

ARGUMENT

I. LEGAL STANDARD

The Federal Rule of Civil Procedure Rule 11 provides for the striking of pleadings and the imposition of disciplinary sanctions on attorneys or pro se litigants who abuse the signing of pleadings.

Rule 11 was promulgated to limit abuses and bad faith acts by attorneys and pro se litigants in court. Tarkowski v. County of Lake, 775 F.2d 173, 175-176 (7th Cir. 1985). Rule 11 takes effect when the attorney or pro se litigant advocates or reaffirms to the court a position contained in a pleading after learning that the position ceases to have merit. Generally, Rule 11 was enacted to require litigants to “stop and think” before making assertions in court. Fed.R.Civ.P. 11 advisory committee notes.

The provisions of Rule 11 apply to motions and other papers by incorporation of Rule 11 into the Federal Rule of Civil Procedure 7(b)(3), which expressly states that “[a]ll motions shall be signed in accordance with Rule 11.”

An attorney or pro se litigant is considered to be “presenting” to the court when the attorney or pro se litigant signs, files, submits, or later advocates a pleading, written motion, or other paper. Fed.R.Civ.P. 11(b). The sanctions for an attorney or pro se litigant violating Rule 11 can be instituted on the court’s initiative, or by motion. Fed.R.Civ.P. 11(c)(1). The procedure for filing a motion for Rule 11 sanctions includes a “safe harbor” of twenty-one days between the service of the motion and its filing with the court, so that the individual who

has allegedly violated Rule 11 has twenty-one days to retract the statement. Fed.R.Civ.P. 11(c)(1)(A).

An attorney who initiates, causes to be initiated, or threatens to initiate a criminal prosecution for the purpose of influencing a civil matter is violating the rules of ethics. See Model Code of Prof'l Responsibility DR 7-105 (1983). See also Gregory G. Sarno, Annotation, *Initiating, or Threatening to Initiate, Criminal Prosecution as Ground for Disciplining Counsel*, 42 A.L.R.4th 1000 (2006). Additionally, a practitioner may be sanctioned, or even disbarred, for coercing any person connected to the case, for making false statements of material fact or law, or for frivolous behavior before the immigration courts – a rule which closely mirrors Rule 11. 1-4 Immigration Law & Procedure § 4.03 (2007).

A Plaintiff that has been harassed, intimidated or treated in a bad faith manner by a Defendant has two recourses: Rule 11(b)(1) and Rule 11(b)(2).

A. Rule 11(b)(1)

Rule 11(b)(1) provides that an attorney or pro se litigant presenting to the court a pleading, written motion, or other papers, certifies to his/ her best knowledge that the claims, defenses, and other legal contentions are not meant to harass, cause unnecessary delay or increase the cost of litigation.

Presentations to the court that contain threats of deportation or criminal action during a civil trial constitute harassment, cause unnecessary delay, or increase the cost of litigation; See People v. Wickes, 112 A.D. 39, 49 (S.Ct. N.Y. App. Div., 1906) citing People v. Eichler (75 Hun 26, 26 N.Y.S. 998; appeal dismissed, 142 N.Y. 642) (holding that an attorney who threatens criminal prosecution to a person involved in the same civil case commits moral

turpitude, and the attorney's belief in the person's guilt is no defense, and not even a mitigating factor).

B. Rule 11(b)(2)

Rule 11(b)(2) provides that an attorney or pro se litigant presenting to the court a pleading, written motion, or other papers, certifies to the attorney's best knowledge that 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.

Presentations to the court that contain threats of deportation or criminal action in a civil trial is not warranted by existing law, or constitutes a frivolous argument to change the law or propose new law. See In re Hart, 131 A.D. 661, 666-667 (S. Ct. N.Y. App. Div., 1st Dept, 1909) (holding that threatening criminal prosecution in order to force a settlement of a civil action is illegal, improper and unprofessional). The courts consider an improper threat for criminal prosecution to be made in bad faith even if guised under a friendly veil, as the court analyzes the intent to induce the other side to act in a certain manner in the civil case. Id.

C. Sanctions for Violating Rule 11

In crafting a sanction for violation of Rule 11, the courts have considerable discretion, including striking the offending presentation; issuing an admonition, reprimand, or censure; requiring participation in seminars and other educational programs; ordering fines payable to the court; and referring the matter to disciplinary authorities. Fed.R.Civ.P. 11 advisory committee notes.

Although Rule 11 carries the purpose to deter rather than to compensate, the Court allows in unusual circumstances for monetary sanctions payable to the offended party for violations of Rule 11(b)(1).

In analyzing the appropriate sanction, the court analyses whether the improper conduct was willful or negligent; whether it was part of a pattern of activity, or an isolated event; whether the offender has engaged in similar conduct in other litigation; whether the conduct has infected the entire paper, or only one particular count or defense; whether it was intended to injure; what effect the conduct had on the litigation process in time or expense; whether the offender person is trained in the law; what amount may be needed to deter the offender from repeating the offense; what amount is needed to deter other litigants from similar activity.

Fed.R.Civ.P. 11 advisory committee notes.

II. THE COURT SHOULD STRIKE THE DEFENDANTS' PLEADINGS, MOTIONS, AND ADVOCACY FOR PLEADINGS AND MOTIONS FOR VIOLATION OF RULE 11 BECAUSE THEY HARASS, INTIMIDATE, CAUSE UNNECESSARY DELAY OR INCREASE THE COST OF LITIGATION

[INSERT FACTS FOR APPLICATION OF THE RULE 11(b)(1) LEGAL

STANDARD ABOVE TO THE FACTS OF THIS CASE]

III. THE COURT SHOULD STRIKE THE DEFENDANTS' PLEADINGS, ADVOCACY FOR PLEADINGS, AND MOTIONS FOR VIOLATION OF RULE 11 BECAUSE THEY ARE FRIVOLOUS AND MADE IN BAD FAITH.

[INSERT FACTS FOR APPLICATION OF THE RULE 11(b)(2) LEGAL

STANDARD ABOVE TO THE FACTS OF THIS CASE]

Iç. CONCLUSION

The Defendants are attempting to present to the court pleadings and motions that unlawfully threaten deportation or criminal action to the Plaintiff, causing harassment, intimidating, unnecessary delays, and increases in cost of litigation to argue frivolous claims that are not proper statements of law.

This Court should strike the Defendants' presentation of pleadings and motions to the extent that they threaten deportation or criminal actions, and impose disciplinary sanctions on the Defendants and their attorneys for their bad faith conduct and abuse of Rule 11.

Dated: [MONTH DAY], 2007

By: _____ /s/
[NAME
TITLE
CONTACT INFORMATION]

[INSERT COURT NAME AND JURISDICTION]

[INSERT NAME OF PLAINTIFFS])	
)	
Plaintiffs,)	
)	
v.)	Civil Action No.[DOCKET NUMBER]
)	
[INSERT NAME OF DEFENDANTS])	
)	
Defendants.)	
)	

ORDER

Having considered this matter on the Plaintiffs’ *Motion in Limine* to Strike the Defendants’ Pleadings, Motions, and Advocacy for Pleadings and Motions for Violation of Federal Rule of Civil Procedure 11, it is hereby

ORDERED that the motion is granted, and that the Defendants are barred from making threats of deportation or criminal action in the above-captioned case.

Date: _____

[NAME OF JUDGE]
[TITLE OF JUDGE/ COURT]