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# Lawyers Crossing the Line: Sanctioned and Reprimanded

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The line between zealousness and sanctionable conduct can be blurry. Courts can impose sanctions on attorneys and their clients when that line is crossed. The procedures to be followed when litigation is necessary in federal court include those governing the truthfulness of what is stated in pleadings. See Fed. R. Bankr. P. 9011; Fed R. Civ. P. 11. Bankruptcy Rule 9011 will be the bane of one asserting frivolous suggestions or acting in bad faith in the bankruptcy court.

In presenting a pleading to a court, the attorney or litigant certifies that to the best of her knowledge and belief, after reasonable inquiry, the pleading is not being presented for an improper purpose, the legal contentions are not frivolous, the factual contentions have or will likely have evidentiary support, and any denials of factual contentions are evidence-based or reasonably based on belief or lack of information. *See* Fed. R. Bankr. P. 9011(b); Fed. R. Civ. P. 11(b).

Attorneys must verify publicly available facts to determine if their client's representations are reasonable and must investigate if any inconsistencies are raised. *See In re Zucaro*, 615 B.R. 150, 157 (Bankr. E.D.N.Y. 2020) (citing *In re Beinhauer*, 570 B.R. 128, 137 (Bankr. E.D.N.Y. 2017)). "'Objectively reasonable' is measured by what a competent attorney admitted to practice before the court would do." *Zucaro*, at 157 (citing *Orton v. Kayne (In re Kayne)*, 453 B.R. 372, 381-82 (9th Cir. BAP 2011)).

In Bankruptcy, federal court rules of procedure governing sanctionable conduct are incorporated into the Bankruptcy Court Rules as Rule 9011 which sets the parameters for sanctions. A party may file a motion asking the court to impose sanctions on the opposing party, describing the alleged sanctionable conduct, as is set forth in Rule 9011(c)(2). Most importantly is compliance with the "safe-harbor provision" which provides that the movant must serve the motion on the opponent but not file it with the court unless the opponent does not withdraw the pleading within 21 days after service. *See* Fed. R. Bankr. P. 9011(c)(2); *see also Bagbag v. Summa Capital Corp.* (*In re Bagbag*), 2020 WL 1304146 (Bankr. S.D.N.Y. Mar. 17, 2020) ("Essentially, Rule 9011(c) provides a

chance for atonement. Sanctions may not be sought unless the atonement is not forthcoming.").

Strict compliance with the procedure is required, and failure to comply warrants denial of the motion. *See Glassman v. Feldman (In re Feldman)*, 606 B.R. 189, 197 (Bankr. E.D.N.Y. 2019) ("Compliance with the safe harbor is a necessary precondition to the imposition of sanctions.") (Citation omitted). Moreover, a court may sua sponte order an attorney, firm or party to show cause why conduct described in the order does not violate Rule 9011(b). *See* Fed. R. Bankr. P. 9011(c)(3).

A court also has the inherent authority to regulate the conduct of attorneys and their clients including the power to impose sanctions for misconduct. Fees and costs awarded are compensatory only and may not be punitive in nature. For conduct to be sanctionable, a court must find that "(1) the challenged claim was without a colorable basis and (2) the claim was brought in bad faith, i.e., motivated by improper purposes such as harassment or delay." *Bagbag*, 2020 WL 1304146 at *6 (quoting *Emmon v. Prospect Capital Corp*., 675 F.3d 138, 142 (2d Cir. 2012)). In *Bagbag*, the Court imposed sanctions in the amount of $10,000.00 on Mr. Bagbag pursuant to Its inherent authority, rather than Rule 9011. *Id*. at 10 (noting that "it is plain to the Court that Mr. Bagbag's misstatements have at least to some extent required separate attention and therefore have magnified the expenses of the proceedings . . . .").

Relief granted pursuant to Rule 9011 varies in nature and may include an award of reasonable attorneys' fees and expenses to the prevailing party. Rule 9011(c)(4) limits sanctions to what will deter the offender from engaging in the same conduct and deter such conduct by others similarly situated. That may come in the form of non-monetary directives, payment of a penalty into court, or an order directing payment to the movant for fees and expenses incurred as a direct result of the violation. *See Raj & Raj Realty, Ltd. v. Difficile Realty Corp*. (*In re Sun Property Consultants, Inc.*), 2021 WL 3375831, *18 (Bankr. S.D.N.Y. Aug. 2, 2021) (imposing sanctions pursuant to Rule 9011 for purposes of deterrence on plaintiff's counsel in the amount of $1,500.00 and plaintiff in the amount of $2,500.00, payable to counsel for the defendant).

Vigorous advocacy by an attorney on behalf of her client is as much a requirement as is the ethical requirement to abjure frivolousness or temptation to proceed in bad faith to reach even a just goal. Bankruptcy Rule 9011 underscores that it is "justice" which is most important not the improper pursuit of a verdict or ruling.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding these provisions, or any other aspect of bankruptcy law, please contact Michael Traison at 312.860.4230 (mtraison@cullenllp.com) or Elizabeth Usinger at 516.357.3869 (eusinger@cullenllp.com).

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