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## Civil Practice

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### Sanctioning Firms for Lawyers' Frivolous Filings

By [Professor Jeffrey A. Parness](#)

**Allowing sanctions against firms for their lawyers' civil-litigation misconduct provides a powerful incentive for firms to monitor and correct lawyer behavior.**

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Are law firms sanctionable under Illinois Supreme Court Rule 137 for frivolous pleadings and other filings? If so, whose conduct, and what conduct, is subject to sanction?

If not, *should* sanctions be authorized, especially since the 1983 version of Federal Rule of Civil Procedure 11 upon which Rule 137 was based, was replaced in 1993 by a rule expressly authorizing sanctions against law firms - an approach some states have also followed? And if sanctions are to be permitted in Illinois, how might law reform be undertaken?

#### ***Medical Alliances: No sanctions for law firms***

The Illinois Appellate Court, Second District, in *Medical Alliances, LLC v Health Care Service Corp*, 371 Ill App 3d 755, 863 NE2d 1169 (2d D 2007), ruled earlier this year that a law firm could not be sanctioned under Rule 137 for the filing of a frivolous pleading by a law firm member. The court, strictly construing the rule because of its "penal nature," followed precedent from the third district and from one first-district panel, and was guided by U.S. Supreme Court precedent on the 1983 version of FRCP 11, and failed to follow another first district panel, which held that "a law firm was jointly and severally liable for the Rule 137 sanctions entered against its attorney."

Rule 137, effective August 1, 1989 (as modified in 1993), preempted section 2-611 of the Code of Civil Procedure and generally followed the 1983 amendments to the 1938 version of FRCP 11. It requires that "Every pleading, motion and other paper of a party represented by an attorney" be "signed by at least one attorney of record in his individual name." This signature is said to certify, inter alia, that the paper was read; was undertaken with "reasonable inquiry;" is "well grounded in fact;" and "is not interposed for any improper purpose."

If a paper is "signed in violation" of the rule, the court "may impose upon the person who signed it...an appropriate sanction, which may include... reasonable expenses...including a reasonable attorney fee." A violation is considered under Rule 137 "a claim within" the relevant civil action. When "a sanction is imposed," the judge must "set forth with specificity the reasons and basis."

The court in *Medical Alliances* found "the plain language" of Rule 137 "precludes a construction that would allow the court to sanction the signing attorney's firm." It looked to the 2000 third district precedent, *Levin v Siegel & Capitel, Ltd*, 314 Ill App 3d 1050, 733 NE2d 896 (3d D 2000), which held "the personal responsibility imposed" by Rule 137 "is nondelegable and not subject to principles of agency or joint and several liability," as well as to the 1991 first district precedent, *Monco v Janus*, 222 Ill App 3d 280, 583 NE2d 575 (1st D 1991), holding "only the signing party could be sanctioned" under section 2-611, "the precursor to Rule 137."

In rejecting law firm liability under Rule 137, the *Medical Alliances* court refused to extend the reasoning of another first district precedent, the 1992 decision in *Brubakken v Morrison*, 240 Ill App 3d 680, 608 NE2d 471 (1st D 1992), recognizing joint and several law firm liability for the Rule 137 misconduct of its attorney. *Brubakken* was favorably employed by the fifth district in 2001 in *Rankin v Heidlebaugh*, 321 Ill App 3d 255, 747 NE2d 483 (5th D 2001).

Like the courts in *Levin* and *Monco*, the court in *Medical Alliances* also found guidance in the 1989 U.S. Supreme Court ruling in *Pavelic & LeFlore v Marvel Entertainment Group*, 493 US 120 (1989). There, the court ruled there could no sanctions against a law firm under the 1983 version of FRCP 11, which, in significant part, contained language that was "almost identical" to the words now in Rule 137.

### **Other sources of sanctioning power**

Assuming Rule 137 is best read as not itself authorizing sanctions against law firms, are law firms necessarily immune from sanctions tied to the frivolous papers of their attorneys? Perhaps not, if Rule 137 does not itself prohibit such sanctions and sanctioning powers can be derived from authority outside the rule.

Unfortunately, the first, second, and third district precedents forbidding Rule 137 sanctions do not speak to other possible sources of authority. Elsewhere, courts have employed "inherent" authority to sanction those responsible for civil litigation misconduct where express written sanctioning powers are absent, and perhaps not forbidden (some statutes foreclosing inherent judicial authority will be unconstitutional on separation of powers grounds).

In 1993, for example, a panel of the first district in *Pagano v Rand Materials Handling Equipment Co, Inc*, 249 Ill App 3d 995, 621 NE2d 26 (1st D 1993), recognized that an Illinois trial court had "inherent" sanctioning power "over all those who appear before it," including law firms whose lawyers present "offensive" papers. The *Pagano* court used the 1980 U.S. Supreme Court precedent in *Roadway Express, Inc v Piper*, 447 US 752 (1980), recognizing "inherent power...to levy sanctions in response to abusive litigation practices" Id at 765, relying on *Link v Wabash R Co*, 370 US 626, 632 (1962), unaddressed directly by rules or statutes so that courts may "manage their own affairs." Such abusive practices include, at least, "willful disobedience" of court orders, as well as conduct undertaken "'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Roadway* at 766, quoting *F.D. Rich Co v Industrial Lumber Co*, 417 US 116, 129 (1974).

Inherent sanctioning authority is most needed in Illinois where misconduct is bad and Rule 137 and other written laws do not permit, but also do not deny, the power to sanction. Inherent sanctioning authority should include the power to deter and to compensate, as well as the power to punish those harmed by such misconduct.

Not all sanctions for civil litigation misconduct should have a "penal nature." Though the Illinois Supreme Court is (and was) prone to say Rule 137 (and section 2-611) is (and was) "penal in nature," that court has also correctly recognized that penalty is but one purpose of the written laws on sanctioning civil litigation misconduct. As does FRCP 11, Rule 137 (and section 2-622) permit (and permitted) nonpunitive sanctions for unreasonable, though not willful, acts, that can include (and included) expense (encompassing attorney's fees) recoveries and mandatory CLE.

Civil litigation misconduct laws can be employed to compensate, deter, and educate as well as punish. As to law firms, consider the need for inherent sanctioning authority today where a frivolous personal injury complaint (or answer) filed by an attorney has been dismissed by a court that finds nine earlier comparable complaints (or answers) filed by nine other attorneys were also dismissed as frivolous, where all 10 attorneys work in the same law firm.

### **Federal rules allow sanctions against firms**

Federal rulemakers have recognized since 1983 important differences between sanctioning attorneys and sanctioning their law firms. They amended FRCP 11 in 1993 to overrule *Pavelic*. This federal rule now expressly authorizes the sanctioning of "law firms" that "present" frivolous papers or that are responsible for the presentation of frivolous papers on behalf of others.

Additionally, the rule expressly recognizes that law firms, "absent exceptional circumstances," will be held jointly responsible for "violations committed by its partners, associates and employees." Incidentally, the rule also permits trial judges to take "initiative" against "an attorney, law firm, or party" involved with frivolous papers.

And the rule may be used for deterrence and compensation as well as for punishment. The original (1938) language requiring "willful" violations for all sanctions was removed in 1983 (so that any violation is now sanctionable).

The legislative history accompanying the 1993 federal rule recognizes that in "unusual circumstances" an attorney presenting a frivolous paper may escape sanction altogether; at times, a court could impose a sanction only upon those who "caused" the violation, including attorneys in the presenter's law firm, co-counsel, attorneys from different law firms, or the party. The Advisory Committee's Notes to the 1993 federal rule also state that such exemplary settings include those where "governmental agencies or other institutional parties...impose substantial restrictions on the discretion of individual attorneys" employed by them.

Thus, the 1993 federal rule clearly recognizes that a private law firm may be sanctioned for causing the presentation of a frivolous paper signed by one of its attorneys. To more fully promote the deterrence rationale underlying FRCP 11, it appears that law firms can be held accountable not only for vicarious liability in some cases but also for failure to supervise.

These vicarious and supervisory duties constituted radical changes in direction. A New York City Bar Association Committee read the 1993 amendments as based on the rulemakers' view that litigation standards will be enhanced because "the possibility of law firm liability would create incentives for internal monitoring" within law firms.

The 1993 federal rulemakers said little else about when law firms might be sanctioned. While they listed "a variety of possible sanctions" available against individuals, they failed to speak much about sanctions against legal organizations. The new rule itself states that a "sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or... an order directing payment...of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation."

The accompanying legislative history acknowledges the availability of such particular sanctions as "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head)."

### **Time for judicial rulemaking?**

The conflict among Illinois appellate districts on sanctioning law firms under Rule 137 could be resolved by high court precedent. But is this the best approach?

As Illinois judicial rulemakers added Rule 137 in 1989 following the FRCP 11 amendments in 1983, perhaps they should now revisit Rule 137, at least in its approach to law firms. Judicial rule-making, of course, has the benefit of the public process contemplated by Illinois Supreme Court Rule 3 (requiring broad professional and citizen participation during rulemaking deliberations).

If judicial rulemakers do act, they might wish to consider additional Rule 137 reforms in line with other 1993 amendments to FRCP 11, including a 21-day safe harbor period, possible sanctions against nonsignors who present litigation papers (e.g., by "advocating"), and the proper balance between private interest sanctions (like attorney's fee awards) and public interest sanctions (like bar disciplinary referrals, fines and reprimands).

Other states have already employed the 1993 version of FRCP 11 in amending their civil procedure laws on sanctions for the civil litigation misconduct of law firms. For example, California, Hawaii, Nevada, North Dakota, Oklahoma, Utah, Vermont, West Virginia and Wyoming have each adopted much, if not all, of the 1993 version of FRCP 11. Other state laws can also address sanctioning authority over law firms for the frivolous civil litigation papers of their lawyers.

For example, the New York Code of Professional Responsibility now defines as misconduct the circumvention by a law firm of a disciplinary rule "through actions of another;" "dishonesty, fraud, deceit or misrepresentation" by a law firm; and, conduct by a law firm that is "prejudicial to the administration of justice." Also, the New York Code mandates that a law firm "make

reasonable efforts" to ensure that all its lawyers conform to the disciplinary rules and that it "adequately supervise" those who "work at the firm" in a manner "reasonable" under the circumstances.

The conflicting Illinois precedents on law firm sanctions, together with the often-used federal precedents and the experiences in other states, suggest that any talk about Rule 137 reforms include consideration of both vicarious law firm liability and independent law firm liability (e.g., for ineffective supervision or for its own bad-faith, vexatious, or oppressive conduct).

As to vicarious liability, the question is difficult. Lawmakers in Illinois should look first for guidance to the conflicting views in the Illinois Supreme Court 2004 decision in *Horwitz v Holabird & Root*, 212 Ill 2d 1, 816 NE2d 272 (2004), wherein a divided court found no vicarious liability for a client arising out of the tortious conduct of its attorney during civil litigation unless the client specifically directed, controlled, or authorized the attorney's special method of performing work or unless the client later ratified the attorney's work.

Of course, there is much difference between attorney-client and attorney-law firm relationships. As to independent liability, Illinois lawmakers should seriously consider an oversight duty for law firms modeled on either FRCP 11 or on the New York Professional Conduct Code provisions. With a record of 10 comparably frivolous pleadings recently presented by 10 different lawyers within a single law firm, there's not only smoke, but very likely a fire that needs to be extinguished.

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