

CHAPTER 4 DRAFTING AND FILING THE COMPLAINT

This chapter discusses several basic issues relating to the drafting and filing of a federal court complaint, including the mechanics and strategy of drafting a complaint, as well as selection of parties, alleging facts and framing the request for relief. Sanctions should not be an issue for well-researched and factually-substantiated complaints. Nonetheless, the legal aid attorney should be sensitized to the ethical dimensions and standards of filing a complaint in federal court. Indeed, this MANUAL refers frequently to Rule 11, offers suggestions for complying with the rule, and advises legal aid attorneys to temper zeal and belief in remedying apparent injustices with reflection on the rule's implications for filing complaints and subsequent papers with the court. Finally, this chapter reviews the mechanics of filing a complaint in federal court and the procedure for filing for *in forma pauperis* status.

A sample annotated Complaint in the *Lightfoot v. District of Columbia* case is Document 1 in the Documentary Supplement to this Manual.

I. Drafting the Complaint

The complaint frames the scope of the litigation. As detailed in Chapter 1 of this Manual, the complaint sets forth the facts, the legal theories, the relief requested, and advances the core theory of the litigation. While the attorney's pre-litigation memo and, later, trial notebook may serve as her personal strategic guide, the complaint serves as the litigation map that will determine the route the parties take as they navigate pre-trial motions, discovery, settlement, and trial. It will also serve as the first public face of the litigation, describing the case to the parties, the media, the judge, the clerks, and the opposing counsel and will set the tone for future discussion and communication about the case.

A. PURPOSES OF THE COMPLAINT

The first and primary purpose of the complaint is to commence litigation. The second is to tell a persuasive story to a varied audience. The third purpose is to sufficiently set forth the jurisdictional, factual, and legal bases of the case to avoid or limit the possibility of a motion to dismiss. The fourth purpose is to enhance the usefulness of the defendant's answer to the complaint and the ability to obtain useful information through formal and informal discovery. The fifth purpose is to lay the groundwork for the resolution of the case through settlement.



1. Commencing Litigation

A civil action commences upon the filing of the complaint with the court clerk.¹ The filing date of the complaint ordinarily determines whether the lawsuit is within the applicable statute of limitations. The date of filing also sets the clock running for other dates, such as the deadline for serving the defendant with the summons and complaint.² The date of service then triggers the timing of a series of pretrial procedures.³

When to file the complaint is a decision to be made based on factors beyond the need to meet the statute of limitations. Of course, if your client is facing an irreparable injury, you will need to file the complaint promptly along with or immediately followed by a motion for temporary and preliminary relief. If immediate harm is unlikely, the legal aid attorney may need to balance the client's interest in a prompt resolution of the matter with the risk that the quick filing of a complaint may actually prolong the case in the long run. While complaints can be amended fairly liberally,⁴ doing so takes time and may ultimately delay resolution of the case. Often, the best approach is to spend the time needed initially to file a polished and thorough complaint.

You must also bear in mind that litigation is like a chess match. While the complaint is your first move, you must have subsequent moves in mind. Such tactics include filing a prompt motion for class certification, a motion for summary judgment on cases involving little or no discovery, or pressing for a prompt initial conference and discovery. Once you have contemplated your subsequent moves, reexamine your complaint to make sure that it adequately supports these subsequent strategies. These strategies may call upon you to begin drafting additional documents before the complaint is filed.

2. Telling the Story

The complaint is the first opportunity that an attorney has to tell the client's story and to explain why the lawsuit has been filed. It is the first document that will be seen by the judge and law clerks and will be referred to by them repeatedly throughout the case. The complaint may also have an audience in the clients, the defendants, opposing counsel, the public, the media, and other observers. The complaint must therefore be logically and narratively compelling so that, when the reader reaches the final page, he feels that a wrong has been committed, that your legal claims are sound, and that the relief you are requesting is reasonable and deserved. In addition,

¹Fed. R. Civ. P. 3.

²*Id.* 4(m). Filing and service are discussed *infra*.

³*See, e.g.*, Fed. R. Civ. P. 12(a), 16(b).

⁴Fed. R. Civ. P. 15.



the complaint is your first opportunity to present yourself as the attorney for the plaintiffs; thus, you want it to be error free, well-written, persuasive, and reliable.

The best place to give a clear and concise summary of your client's story is in the complaint's preliminary statement. It is the legal "sound bite" that introduces the more technical and complex matters that follow and is what the judge and others rely most upon in understanding what your case is about. It should be focused and written in plain language. Drafting the preliminary statement is truly an art because although it is neither an argument nor a detailed rehashing of the contents of the complaint, it must be convincing.

The balance of the complaint continues to tell the story of the case. The "facts" section is the primary place where the story is fleshed out. As in an affidavit, each paragraph of the factual allegations should set out a simple, objective statement of fact.⁵ Every fact that is necessary to support each of the legal claims must be included. It should allege with some precision which legal requirements have been violated, what conduct defendants have done or have omitted, and what relief is sought. You should "cross check" the complaint against your litigation and trial plan and, as you draft the complaint, have an understanding of how each fact alleged will be proved. Thus, as both a matter of style and strategy, you should generally avoid prefacing allegations with "upon information and belief." If, however, an allegation lacks evidentiary support but is "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery," it must be specifically identified in the complaint.⁶ Once the factual portion of the story is told, the sections on legal claims and relief should flow as logical extensions of the facts bringing the reader along with you.

When drafting, never merely copy allegations from another complaint without clearly understanding whether those allegations are appropriate in the case and verifying that the allegations comport with the current law in your district or circuit. Ask colleagues in your office to review the complaint as a double-check for factual clarity and legal sufficiency.

3. Protection Against Motion to Dismiss

The complaint must be sufficient to survive a motion to dismiss. Your thorough review of the law in the substantive area involved should reveal to you the typical grounds for motions to dismiss and the potential weaknesses in your case. It is helpful to imagine yourself as the associate in the opposing counsel's firm or office assigned to draft a motion to dismiss your case;

⁵*Id.* 10(b).

⁶*Id.* 11(b)(3).



thus, providing yourself with an opportunity to identify and address your complaint's weaknesses before you file it.

This does not mean that every factual detail and subsidiary legal assertion must be spelled out in the complaint. All “the Rules require is a ‘short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the ground upon which it rests.”⁷ The U.S. Supreme Court recently reaffirmed this principle in *Swierkiewicz v. Sorema*.⁸ In *Swierkiewicz*, the Court held that a plaintiff pleading Title VII and Age Discrimination in Employment Act claims was not required to plead each element of a prima facie case of discrimination.⁹ Noting that the *McDonnell Douglas* standard was an evidentiary, not a pleading requirement, the Court held that the complaint need only give “fair notice of the basis for [plaintiff’s] claim.”¹⁰

4. Enhancing Usefulness of the Answer and Discovery

The manner in which the complaint is drafted can enhance the usefulness of the opposing party’s answer and facilitate initial disclosures. Pleadings should be “simple, concise and direct.”¹¹ The defendant has a duty to answer factual allegations affirmatively and in good faith, and a plaintiff’s factual assertion is deemed admitted by the defendant when not specifically denied in the responsive pleading.¹² Hence, the more specific and defined your factual allegations are, the less “wiggle room” your adversary has to answer those allegations evasively. As in most legal drafting, particular potential pitfalls are the use of compound statements, the conditional tense, and statements that include assumptions or facts not yet admitted or proved.

Similarly, the scope of permissible discovery turns on relevance to the claims advanced.¹³ The more complete your factual allegations are, the less room the defendant may have to argue that the discovery you seek exceeds the bounds of relevance to the claims made. To be sure, there may be cases in which strategy, timing, knowledge of the client or the degree of available pre-filing investigation possible under the circumstances, combined with the dictates of Rule 11, permit only general allegations to be made in the complaint. The presumptive goal of specificity can legitimately be overridden in particular cases.

⁷*Conley v. Gibson*, 355 U.S. 41, 47 (1957); Fed. R. Civ. P. 8(a).

⁸*Swierkiewicz v. Sorema*, 534 U.S. 506 (2002).

⁹*Id.* See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹⁰*Swierkiewicz*, 534 U.S. at 514.

¹¹Fed. R. Civ. P. 8(e).

¹²*Id.* 8(b).

¹³*Id.* 26(b)(1); see also *id.* 26(a)(1) (mandatory initial disclosures).



5. Basis for Settlement

You will be thinking about settlement from the moment you begin to prepare the litigation. The complaint serves as the basis and framework for settlement throughout the case, especially if prompt settlement is desired or possible. Although there are exceptions when settlement can provide more relief than you can request from the court, in general, the relief portion of the complaint serves as the outside boundaries of what you can request from the defendant in settlement negotiations. Thus, consider including in the complaint not only what you want to receive but also what your opponent does not want to provide. Relief that may be of relatively little importance to you may be of great concern to your opponent. Giving up that relief may prompt more significant concessions by the defendant. The quality of the complaint will also serve to enhance your actual and perceived bargaining position as it reflects your skill as a litigator, the thoroughness with which you are approaching the issue, and the factual and legal strength of your case.

A detailed complaint may serve to the plaintiff's benefit in court-ordered mediation processes.¹⁴ A well-drafted complaint followed by a typically boilerplate answer effectively tells a story from the plaintiff's perspective to the third-party neutral. Atmospherically or substantively, this may create a measure of momentum for encouraging settlement on terms more favorable to the plaintiff.

B. CAPTION AND PARTIES

All components of the complaint deserve thought, including the case caption. For instance, the order in which the individual plaintiffs and defendants are listed may be important to the participating organization or to advance a public relations objective which emphasizes the compelling facts of the lead plaintiff. In the *Lightfoot v. District of Columbia* case, Elizabeth Lightfoot was selected as the lead plaintiff because of the strength of her individual facts, her commitment to the case, and capacity and willingness to serve the interests of the putative class well, both in and out of court. **As your review the section that follows, consult Document 1 of the Documentary Supplement to illustrate many of these points.**

1. Individual, Group, and Class Plaintiffs

The first named plaintiff in a case involving more than one should be one best able to surmount jurisdictional challenges, such as standing and mootness, and most likely to see the case through

¹⁴See Chapter 6, Section IV, of this MANUAL.



to conclusion. Frequent changes to the case caption throughout the case can prove confusing. You may also wish the first plaintiff to have a particularly compelling set of facts and to be effective at articulating it publicly. At the same time, the concerns of other named plaintiffs may suggest a neutral ordering system.

After the preliminary statement and statement of jurisdiction, the complaint should identify the parties. The plaintiffs should be identified first, and in such a way that their standing and the relief they seek seem self-evident. The defendants should then be identified, indicating either the injury they inflicted or the role they played in the facts underlying the complaint.

The plaintiffs should include the people injured by the conduct that led to the litigation and who may benefit from the relief sought or granted. That relief may be retrospective or prospective in nature, or both. Whether a class action is appropriate will depend on the nature of the challenged conduct, the relief sought, and difficulties of joinder.¹⁵ If so, careful selection of class representatives is required, and the complaint will include class allegations. The complaint should be accompanied by a motion for class certification. That motion should be heard as quickly as possible as the court must determine whether to certify a class “at an early practicable time.”¹⁶

The plaintiff or plaintiffs may proceed anonymously where there is a good reason to do so. Such reasons may include allegations about the mental health, medical, or sexual history of the plaintiff or other sensitive information the revelation of which and association with the plaintiff would cause harm or embarrassment. If you choose to file anonymously, you file a copy of the complaint with the plaintiff’s name, a motion to the court explaining the reason for filing anonymously, and a complaint with a substitute name (e.g., Jane Doe). The order you prepare includes instructions for sealing the original complaint and permission to proceed henceforth with the substitute name. The defendant will be served a copy of the original complaint—the defendant is entitled to know who brought suit—and a copy of the signed order, which also requires the defendant to keep the name of the plaintiff confidential. Only in rare circumstances does the defendant object to an order of anonymity. Check the local rules of court for local practices regarding anonymous filing and redacting sensitive information.

2. Defendants

¹⁵See Chapter 7 of this MANUAL. Programs that receive funding from the Legal Services Corporation (LSC) are prohibited from initiating or participating in class actions. 45 C.F.R. § 1617.

¹⁶Fed. R. Civ. P. 23 (c)(1)(a).



The defendants should be identified with a close eye toward relief. As a rule of thumb, if you seek damages, seek them from the person who inflicted the injury leading to the claim for damages. By contrast, if you seek injunctive relief, you must name the highest-level officials, usually the department heads, since they can offer the most thorough and far-ranging relief. Injunctive relief starts at the top; damages start at the bottom. The bedrock principle is to include as defendants everyone necessary for relief.

The allegations as to the defendants should include not only their past, present, or future conduct but also their authority. This is obvious when you are seeking injunctive relief since officials may be enjoined only to act within their authority. But it is equally true when damages are being sought. You must particularly allege an official's authority if you are seeking damages not only from that official but also from the official's superior or the municipality or agency employing the official. Misconduct beyond the scope of employment rarely leads to vicarious or *respondeat superior* liability. Thus, allegations as to authority are important for both injunctive relief and damages.

Defendant classes may be named under Rule 23. This is equally true in many state courts. Naming defendant classes may be of considerable value when you bring an action against a city or county in a state where similar practices are followed in a number of cities or counties.

In federal court, a state may not be sued in its own name. Since *Ex parte Young*, complaints for injunctive relief are filed against a state official, not the state itself.¹⁷ Suits against a state official in federal court may not seek damages from that person in that person's official capacity if such damages ultimately would come from the state treasury.

C. PLEADING FACTS AND THEORIES

For the strategic reasons outlined above, the facts should be drafted so that they tell a clear and compelling story guiding the reader to believe in the obvious need for relief. Casting the story in human terms makes it more immediate and, therefore, more compelling. Where possible, refer to the plaintiff by name rather than by legal designation. Defendants can be personalized when you are emphasizing their acts as individuals, or they can be depersonalized to remove sympathy for them and remind the reader of their essential nature as an institution or bureaucracy. If possible, a non-attorney unfamiliar with the case should review the facts to make sure the story is clear and convincing.

In general, a chronological framework supports the clarity of your presentation. Brevity and clarity may also be enhanced by attaching supplementary materials, such as notices, and by incorporating them by reference. As in any writing, pacing is an important element of your

¹⁷*Ex Parte Young*, 209 U.S. 123 (1909). See Chapter 8, Section II, of this MANUAL.



drafting. For instance, if the age and physical condition of your plaintiff is critical to your case, you may devote separate paragraphs to stating the plaintiff's age, describing each physical or mental impairment, and the effect each impairment has on the plaintiff. On the other hand, if these facts are irrelevant to your legal claims, you may choose to include a range of identifying and background information in a single paragraph, which introduces your client without distracting from the more important core of the story you need to tell.

Although you are likely to have several claims, you will have one core legal theory—the legal theme of the case. That theme should be sounded in the complaint's preliminary statement in a succinct but persuasive way. An example of a poor preliminary statement appears in the *Jones v. Clinton* complaint: "Plaintiff Paula Corbin Jones, by counsel, brings this action to obtain redress for the deprivation and conspiracy to deprive Plaintiff of her federally protected rights as hereafter alleged, and for intentional infliction of emotional distress, and for defamation." The statement is written in overly stilted, legalistic language and is devoid of any mention of a core theory or persuasive connection between the facts and the legal claims. Were this not a case destined to capture the attention of the nation, the statement alone would not have commended the continued reading of the complaint.

Following the chronology of facts, the complaint should set forth the legal theories that lead to relief. These may be constitutional, statutory, or regulatory. They may include both federal and state theories. You must draft the theories clearly and cite their statutory, regulatory, or constitutional bases. In complex regulatory cases, the legal aid attorney should reduce legal complexity to a minimum in the body of the complaint. The essential elements of the statutory and regulatory scheme should be set out in the complaint, but a detailed discussion should wait for briefing.

In drafting your legal claims, you are likely to have choices about grouping claims together or listing them separately. For instance, a claim might be "Defendant engaged in unlawful discrimination by denying plaintiff an apartment because of plaintiff's national origin in violation of" and then listing the various statutes, regulations, and other sources of law. Or a claim might be stated as "Defendant violated the Fair Housing Act by (a) refusing plaintiff an apartment and (b) giving plaintiff information different from other applicants." The key to well-crafted pleading of claims is to strive for clarity, to delineate them based on the themes of the case, and to ensure the preservation of claims should any others be dismissed. If claims are grouped incoherently, then a motion to dismiss may remove valid claims from your case. Clear delineation of your claims helps in your ongoing case management as you plan and conduct discovery and as you maintain time records for an application for attorneys' fees.

D. FRAMING RELIEF

FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS

© 2006 by Sargent Shriver National Center on Poverty Law. All rights reserved, including the right to reproduce this manual in any form. For inquiries, contact the Sargent Shriver National Center on Poverty Law, 50 East Washington Street, Suite 500, Chicago, Illinois 60602



**SHRIVER
CENTER**

Sargent Shriver National Center on Poverty Law

The prayer or request for relief is a required part of the complaint. It forms the opening gambit in any negotiations. It acts as the “ceiling” for what you can obtain either in settlement or from the court. It colors the way others, including the court and the defendant, perceive the lawsuit depending on whether they view what you want as reasonable or as overreaching. Thus, how you frame your request for relief is a strategic decision.

Each type of relief you want must be listed. Your requested relief might include the following:

- Injunctive relief (prospective, retroactive or both)
- Declaratory relief
- Compensatory damages
- Punitive damages
- Pain and suffering
- Statutory damages, such as treble damages or fines
- Reimbursement of funds paid or lost
- Class action certification, if applicable
- Attorneys’ fees¹⁸
- Costs

Each type of relief must be supported by the factual allegations and legal claims that precede it. If injunctive relief is sought, there should also be a routine allegation that equitable relief is necessary because relief at law is inadequate. The request for relief should also contain a catchall request for “such other and further relief as this court may deem just and proper.” This clause is your protection if you seek to obtain more than or different relief from what you contemplated when you drafted the complaint. When your client reviews the complaint, you must explain the purpose of the request for relief; clients sometimes believe that the amount of damages listed is what they will get if they win the case or settle.

The specificity of the relief requested depends on the complexity of the case and the degree to which specifics are known at the time of filing. For example, if the relief requested is clear and specific, it may be best to state it: “Provide plaintiff with the public assistance benefits to which he was entitled from January 15, 2002, the date of his eligibility.” A request for systemic relief, however, may be phrased more broadly, with details to follow in a consent decree or remedial order. The important principle is to be broad and inclusive in the prayer for relief. Do not leave anything out.

¹⁸LSC-funded advocates may not include a request for attorney fees in the prayer for relief. 45 C.F.R. § 1642.

II. Sanctions

Federal Rule of Civil Procedure 11 authorizes federal courts to issue sanctions against parties or their attorneys who file pleadings, motions, or other papers that lack a required level of evidentiary or legal support.

A. FEDERAL RULE OF CIVIL PROCEDURE 11

The aim of Rule 11 is to

- deter frivolous filings,
- “curb [] abuses of the legal system,”¹⁹ and
- require litigants to refrain from conduct that frustrates Rule 11’s goal of “just, speedy, and inexpensive determination of every action.”²⁰

Rule 11, as amended in 1993, requires litigants to sign “every pleading, written motion, and other paper.”²¹ That is, litigants must sign every document filed with the court.²² The signer’s address and telephone number must be included, and local rules of court may require additional identifying information to accompany the signature, such as facsimile numbers.²³ In *Business Guides Inc. v. Chromatic Communications Enterprises*, the Supreme Court noted that “[t]he essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit. A signature sends a message to the district court that this document is to be taken seriously.”²⁴ A typed name is not a signature.²⁵ But courts may by local rule establish electronic filing policies consistent with technical standards adopted by the Judicial Conference of the United States.²⁶

¹⁹*Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990).

²⁰Fed. R. Civ. P. 1; Fed. R. Civ. P. 11 advisory committee’s notes (1993).

²¹“Other papers” is broadly interpreted. See, e.g., *Becker v. Montgomery*, 532 U.S. 757, 763 (2001) (notice of appeal); *Apollistic Pentecostal Church v. Colbert*, 169 F.3d 409, 417 (6th Cir. 1999) (garnishee disclosure).

²²Fed. R. Civ. P. 11(a).

²³Fed. R. Civ. P. 11 advisory committee’s notes (1993).

²⁴*Bus. Guides Inc. v. Chromatic Commc’ns Enters.*, 498 U.S. 533, 546 (1991).

²⁵*Becker v. Montgomery*, 532 U.S. 757, 763 (2001). Should a filing be made without a handwritten signature, the clerk’s office should return it and a substitute promptly filed. See Fed. R. Civ. P. 11(a).

²⁶Fed. R. Civ. P. 5(e); see also Fed. R. Civ. P. 5 advisory committee’s notes (1996) (“An electronic filing that complies with the local rule satisfies all requirements for filing on paper, signature, or verification.”).



Rule 11(b) provides that, “[b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief formed after an inquiry reasonable under the circumstances” that the material presented conforms to Rule 11 standards.²⁷ The “later advocating” requirement was added to Rule 11(b) in 1993 to emphasize that Rule 11 obligations continue throughout the litigation process.²⁸ This amendment “subjects litigants to potential sanctions for insisting upon a position after it is no longer tenable.”²⁹ Although a litigant must discontinue advocating a position that she later learns is invalid, Rule 11 does not require a formal amendment of the initial pleading.³⁰ Nor does Rule 11 cover contentions made before the court at oral argument regarding matters not previously raised because attorneys may lack time to research their validity.³¹ However, oral statements that advocate baseless assertions made in writing are sanctionable.³²

Rule 11(b) enumerates four standards to which litigants must adhere when presenting materials to the court. First, Rule 11(b)(1) requires that materials not be presented for an improper purpose. Prohibited improper purposes include harassment, “unnecessary delay and needless increase in the cost of litigation.”³³ Improper purpose is generally reviewed objectively, based upon a totality of the circumstances, given the difficulty in discerning subjective intent. Yet, there is some disagreement among the courts on three important questions: (1) whether

²⁷Fed. R. Civ. P. 11(b).

²⁸*See, e.g., Buster v. Greisen*, 104 F.3d 1186, 1190 n. 4 (9th Cir. 1997) (holding that district court could impose sanctions on plaintiff for continuing to argue frivolous contentions asserted in complaint even when action was filed in state court and removed).

²⁹Fed. R. Civ. P. 11 advisory committee’s notes (1993). At the same time, a voluntary dismissal of a complaint does not divest the trial court of jurisdiction to issue Rule 11 sanctions. *Cooter & Gell*, 496 U.S. at 395.

³⁰Fed. R. Civ. P. 11 advisory committee’s notes (1993) (“Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.”).

³¹*Id.*

³²*Phonometrics, Inc. v. Econ. Inns of Am.*, 349 F.3d 1356, 1361 (Fed. Cir. 2003), *cert. denied*, 541 U.S. 1010 (2004).

³³Fed. R. Civ. P. 11(b)(1). This list is not exclusive. Actions intended to embarrass an opposing party may, for example, be sanctionable under Fed. R. Civ. P. 11(b)(1). *See Whitehead v. Food Max of Miss.*, 332 F.3d 796, 807 (5th Cir.) (en banc), *cert. denied*, 540 U.S. 1047 (2003). So may actions filed to make a political point. *See Saltany v. Reagan*, 886 F.2d 438, 440 (D.C. Cir. 1989).



subjective intent should be considered as a factor in this analysis,³⁴ (2) how to evaluate cases involving mixed motives,³⁵ and (3) whether a nonfrivolous complaint may nevertheless be subject to sanction as being filed for an improper purpose.³⁶ Second, Rule 11(b)(2) states that any claims, defenses, or legal contentions presented to the court must be either grounded in existing law or asserted to extend, modify, or reverse existing law or, as of 1993, establish new law.³⁷ Of significance to legal aid attorneys, several decisions illustrate that plausible arguments to extend, modify, or reverse existing law are not subject to Rule 11 sanctions.³⁸ Nonetheless,

³⁴*Compare Szabo Food Serv. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987) (considering intent) with *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986) (not considering intent).

³⁵*See Silva v. Witschen*, 19 F.3d 725, 730 (1st Cir. 1994) (upholding sanctions when proper motive was mixed with improper objective of pressuring defendants); *City of E. St. Louis v. Circuit Court for Twentieth Judicial Circuit, St. Clair County, Ill.*, 986 F.2d 1142, 1143 (7th Cir. 1993) (“[C]ounsel has a duty to make a reasonable inquiry in advance of filing to ensure that no action for any improper purpose is filed.”); *but see Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir. 1995) (“A party should not be penalized for or deferred from seeking and obtaining warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper.”); *In re Kunstler*, 914 F.2d 505, 518 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991) (“if a complaint is filed to vindicate rights in court, and for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose. Thus, the purpose to vindicate rights in court must be central and sincere.”).

³⁶*Compare Senese v. Chicago Area I.B. of T. Pension Fund*, 237 F.3d 819 (7th Cir. 2001) (Rule 11 may be violated when a complaint with a legal and factual basis is filed for an improper purpose); *Matta v. May*, 118 F.3d 410 (5th Cir. 1997) (same). *Cf.*; with *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1991) (en banc) (a well-grounded complaint cannot be sanctionable whatever the attorney’s subjective intent); *Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 (10th Cir. 1988) (same); *Nat’l Ass’n of Gov’t Employees v. Nat’l Fed’n of Fed. Employees*, 844 F.2d 216, 223-24 (5th Cir. 1988). *See also* 2 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 11.11[8][d] (3d ed. 1997).

³⁷*See* Fed. R. Civ. P. 11 advisory committee’s notes (1993) (“Although arguments for a change of law are not required to be specifically identified, a contention that is so identified should be viewed with greater tolerance under the rule.”).

³⁸*See, e.g., Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 156-57 (4th Cir. 2002) (reversing sanction of attorney who inartfully argued for reversal of Circuit precedent). *Gibson v. Chrysler Corp.*, 261 F.3d 927, 949 (9th Cir. 2001) (reversing the award of Rule 11 sanctions because “we recognize the difficulties faced by parties who seek to advance novel legal arguments”); *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998) (“[T]he purpose of Rule 11 is to deter frivolous lawsuits and not to deter novel legal arguments or cases of first impression.”); *Pelozza v.*



legal services attorneys should document the legal research performed and consultations with other attorneys made before filing because these efforts are subject to scrutiny should a Rule 11 motion be filed.³⁹

Third, Rule 11(b)(3) requires that any factual allegation either have evidentiary support or, if identified as such, be “likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.”⁴⁰ Rule 11(b)(3) may offer some latitude in cases common to legal services practice. When a client or other witness gives the attorney a good-faith basis for believing certain facts as true, the defendant has control over evidence of such facts, and circumstances require prompt filing; an attorney may file a complaint without specific evidentiary support, but only if allegations without such support are specifically identified.⁴¹

Fourth, Rule 11(b)(4) states that any denials of factual contentions must be either “warranted on the evidence” or, if identified as such, “reasonably based on a lack of information or belief.”⁴² The addition of this fourth requirement to the 1993 amended rule ensures an equal application to both plaintiffs and defendants.

The standard for evaluating Rule 11 violations is an objective one of reasonableness under the circumstances.⁴³ A court need not find bad faith to issue sanctions.⁴⁴ With respect to legal assertions, the objective standard is met when the legal assertion is (1) objectively baseless and (2) the attorney

Capistrano Unified Sch. Dist., 37 F.3d 517, 524 (9th Cir. 1994) (dismissed complaint was not sanctionable as it raised important questions of first impression); *United States v. Alexander*, 981 F.2d 250, 253 (5th Cir. 1993) (“Parties who argue points of first impression in a circuit are not ordinarily the recipients of Rule 11 sanctions order.”); *Moreno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990) (“[T]o constitute a frivolous legal position for purposes of Rule 11 sanction, it must be clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands.”).

³⁹Fed. R. Civ. P.11 advisory committee’s notes (1993). See *Savino v. Computer Credit Inc.*, 164 F.3d 81, 88 (2d Cir. 1998).

⁴⁰Fed. R. Civ. P.11(b)(3). See, e.g. *U.S. Bank Nat’l Assn. v. Sullivan-Moore*, 406 F.3d 465, 469-70 (7th Cir. 2005) (sanctions upheld where law firm caused the eviction of tenant knowing that service address was incorrect).

⁴¹Fed. R. Civ. P. 11 advisory committee’s notes (1993).

⁴²Fed. R. Civ. P. 11(b)(4).

⁴³Fed. R. Civ. P. 11 advisory committee’s notes (1993) (Rule “establishes an objective standard, intended to eliminate any empty-head pureheart justification for patently frivolous arguments.”). See also *Bus. Guides Inc.*, 498 U.S. at 549-51 (objective reasonableness standard applies to both attorneys and represented parties).

⁴⁴*Young v. City of Providence*, 404 F.3d 33, 40 (1st Cir. 2005).



has not made a “reasonable and competent inquiry” before making it.⁴⁵ In *Divane v. Krull Electric Co.* the court identified the circumstances which govern whether factual assertions are objectively reasonable:⁴⁶

whether the signer of the documents had sufficient time for investigation; the extent to which the attorney had to rely on his or her client for the factual foundation underlying the pleading, motion or other paper, whether the case was accepted from another attorney, the complexity of the facts and the attorney’s ability to do a sufficient pre-filing investigation; and whether discovery would have been beneficial to the development of the underlying facts.⁴⁷

Rule 11(c) permits, but since 1993 no longer requires, the court to issue sanctions to attorneys, law firms, or parties in violation of the rule or responsible for the violation.⁴⁸ The 1993 amendments made the issuance of sanctions, whether prompted by motion or by the court’s own initiative, discretionary rather than mandatory.⁴⁹ The advisory committee’s notes list several factors that the courts should consider in deciding whether to issue a sanction and, if appropriate, the kind of sanction to impose:

Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants.⁵⁰

⁴⁵*Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005) (failure to allege essential elements of a Section 1985(3) claim is sanctionable).

⁴⁶*Divane v. Krull Elec. Co.*, 200 F.3d 1020, 1028 (7th Cir. 1999) (quoting *Brown v. Fed’n of State Med. Bds. of the U.S.*, 830 F.2d 1429, 1435 (7th Cir. 1987)).

⁴⁷*Divane*, 200 F.3d at 1028. See also *Jones v. Int’l Riding Helmets Ltd.*, 49 F.3d 692, 695 (11th Cir. 1995); *Rodick v. City of Schenectady*, 1 F.3d 1341, 1351 (2d Cir. 1993) (“Where an attorney is forced to plead under exigent circumstances, her reliance on the affidavits of her clients should be sufficient to constitute reasonable investigation for purposes of Rule 11.”).

⁴⁸Fed. R. Civ. P. 11(c).

⁴⁹*Id.*

⁵⁰Fed. R. Civ. P. 11 advisory committee’s notes (1993).



The 1993 amendments also stress that the purpose of sanctions is deterrence rather than compensation and highlight the availability of non-monetary sanctions available to the court.⁵¹ Consistent with this deterrence function, “if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty.”⁵² These amendments lessen the incentive for a litigant to file a motion for sanctions because the litigant is less likely to profit financially if a Rule 11 violation is found by the court. Rule 11, however, also authorizes the direct payment of fees and expenses to the moving party when “warranted for effective deterrence.”⁵³ At bottom, “sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.”⁵⁴

Rule 11 authorizes the court to sanction both attorneys and their clients.⁵⁵ Rule 11(c)(1)(A) further provides that, “[a]bsent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.”⁵⁶ Although this provision has apparently not been applied to a legal services organization, it does suggest that such an entity could be regarded as a law firm and, therefore, subject to sanctions when an attorney it employs violates Rule 11. The advisory committee’s notes state that the court may appropriately inquire whether “institutional parties” impose restrictions on the discretion of individual attorneys.⁵⁷ To the extent that

⁵¹*Id.* (non-monetary sanctions include striking the offending filing, admonition, reprimand, or censure; attendance at continuing legal education courses; or referral to disciplinary authorities).

⁵²*Id.* See also *Method Elecs. v. Adam Techs.*, 371 F.3d 923, 926 (7th Cir. 2004) (court cannot award attorney’s fees as a sanction sua sponte); *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 57 (2d Cir. 2000) (“[A]bsent a specific motion for attorneys’ fees, the court only had authority to order sanctions payable to the court.”).

⁵³Fed. R. Civ. P. 11(c)(2). *But see Massengale v. Ray*, 267 F.3d 1298, 1302 (11th Cir. 2001) (Rule 11 does not allow for an award of attorney fees to a *pro se* litigant as a sanction). At the same time, the court may account for the attorney’s financial condition in determining whether and the degree to which to issue monetary sanctions. *DiPaolo v. Moran*, 407 F.3d 140, 145-46 (3rd Cir. 2005).

⁵⁴Fed. R. Civ. P. 11 advisory committee’s notes (1993).

⁵⁵Fed. R. Civ. P. 11(c). See also *Bus. Guides*, 498 U.S. at 544-48 (Rule 11 applies to represented parties who sign court filings). A court may not, however, sanction a represented party for violation of Rule 11(b)(2). Fed. R. Civ. P. 11(c)(2)(A). Rule 11 also applies to *pro se* litigants, but may account for the *pro se* litigant’s financial situation in determining whether to award monetary sanctions. *Moore v. SouthTrust Corp.*, 392 F. Supp. 2d 724, 736 (E.D. Va. 2005).

⁵⁶This 1993 provision effectively overturns *Pavelic & LeFlore v. Marvel Entm’t Group*, 493 U.S. 120 (1989). The advisory committee’s notes justify this expansion of potential liability on the ground that the safe-harbor provision, discussed below, makes it appropriate to regard a law firm as jointly responsible for the sanctionable conduct of its agents.

⁵⁷Fed. R. Civ. P. 11 advisory committee’s notes (1993).



such restrictions minimize the risk of institutional sanctions, legal aid organizations may wish to consider imposing such restrictions.

Rule 11(c)(1)(A) requires that a party seeking sanctions must serve a separate motion on the alleged offender twenty-one days before filing the motion in court.⁵⁸ During this twenty-one-day period, the party served may withdraw or correct any challenged material, thus eliminating the need for the motion to be filed with the court. This “safe harbor” period aims to decrease the volume of Rule 11 motions that come before the court. Litigants may avoid potential sanctions by withdrawing or amending improper materials without the court’s involvement. The court in *Barber v. Miller* discussed the rationale for the safe-harbor provision as follows:⁵⁹

These provisions are intended to provide a type of “safe harbor” against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party’s motion unless, after receiving the motion, it refused to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.⁶⁰

A court may also levy sanctions *sua sponte* but may do so only after issuing a specific order describing the perceived misconduct and allowing the possible offender an opportunity to show cause why the sanction should not be issued.⁶¹ The rule incorporates a measure of due process protection.⁶² Furthermore, to facilitate appellate review, the rule requires the court to describe the sanctionable conduct and the basis for the sanction imposed.⁶³

⁵⁸Fed. R. Civ. P. 11(c)(1)(A). Counsel are expected to give informal notice prior to drafting and serving such a motion. Fed. R. Civ. P. 11 advisory committee’s notes (1993). See *Gordon v. Unifund CCR Partners*, 345 F.3d 1028 (8th Cir. 2003) (reversing award of Rule 11 sanction when movant did not comply with safe harbor provisions). The Fourth Circuit has held that the safe harbor provisions are not jurisdictional and therefore waivable. *Brickwood Contractors, Inc. v. Datanet Eng’g. Inc.*, 369 F.3d 385 (4th Cir. 2004) (en banc); *Rector v. Approved Fed. Sav. Bank*, 265 F.3d 248, 253 (4th Cir. 2001).

⁵⁹*Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998).

⁶⁰*Id.* at 710.

⁶¹Fed. R. Civ. P.11(c)(1)(B); see *Johnson v. Cherry*, 422 F.3d 540, 551-53 (7th Cir. 2005); *Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 809-10 (8th Cir. 2005).

⁶²See *Margo v. Weiss*, 213 F.3d 55, 64 (2d Cir. 2000).

⁶³Fed. R. Civ. P.11(c)(3).



While the matter may turn on particular facts, generally, Rule 11 sanctions are not immediately appealable under the collateral order doctrine.⁶⁴ On appeal, “[a]ll aspects of a district court’s Rule 11 determination are examined under the abuse of discretion standard.”⁶⁵ Rule 11 is not the sole authority for the issuance of sanctions. Sanctions for discovery abuse are governed by Rules 26 and 37.

B. GHOSTWRITING

Ghostwriting occurs when attorneys draft pleadings or court documents for clients who represent themselves in court *pro se*.⁶⁶ Ghostwriting has been defended as a means to keep *pro se* litigants with meritorious cases from defaulting.⁶⁷ Courts⁶⁸ and most bar ethics committees,⁶⁹

⁶⁴See, e.g., *S. Travel Club Inc. v. Carnival Air Lines*, 986 F.2d 125 (5th Cir. 1993); *Cooper v. Salomon Bros. Inc.*, 1 F.3d 82 (2d Cir. 1993); *Click v. Abilene Nat’l Bank*, 822 F.2d 544 (5th Cir. 1987). Cf. *Morley v. Ciba-Geigy Corp.*, 66 F.3d 21 (2d Cir. 1995); *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330 (9th Cir. 1995); *Transamerica Commercial Finance Corp. v. Banton Inc.*, 970 F.2d 810 (11th Cir. 1992); *Burda v. M. Ecker Co.*, 954 F.2d 434 (7th Cir. 1992); *Riverhead Sav. Bank v. Nat’l Mortgage Equity Corp.*, 893 F.2d 1109 (9th Cir. 1990); *DeSisto Coll. Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989); *Markwell v. County of Bexar*, 878 F.2d 899 (5th Cir. 1989); *Ortho Pharmaceutical Corp. v. Sona Distrib.*, 847 F.2d 1512 (11th Cir. 1988).

⁶⁵*Nyer v. Winterthur Int’l*, 290 F.3d 456, 460 (1st Cir. 2002). See also *Cooter & Gell*, 496 U.S. at 405.

⁶⁶John C. Rothermich, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2697 (1999) (undisclosed ghostwriting likely violates Model Rules 3.3, 8.4(c) and (d)).

⁶⁷*Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1077 n.2 (E.D. Va. 1997).

⁶⁸*Compare Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001) (participating in drafting an appellate brief constitutes “substantial assistance” in violation of Rule 11), *with Ricotta v. California*, 4 F. Supp. 2d 961, 986-87 (S.D. Cal. 1998) (distinguishing ghostwriting from mere “informal advice”); *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997) (ghostwriting interferes with the court’s ability to superintend the proceedings); *Johnson*, 868 F. Supp. 1226, 1232 (D. Colo. 1994) (finding ghostwriting “contemptuous irrespective of the degree to which it is considered unprofessional by the governing bodies of the bar”).

⁶⁹For a useful recent survey of ethics opinions on this point, see Arizona Formal and Informal Opinion 05-06 (July, 2005) (adopting a minority view that an attorney is not ethically required to disclose that he or she engaged in ghostwriting a court document). See also, AMERICAN BAR ASSOCIATION COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL OP. 1414 (1978) (condoning ghostwriting alone, but condemning an attorney who “sat in at trial,” in addition to preparing multiple court documents, while his client represented himself as *pro se*).



however, criticize the practice, particularly when undisclosed, as taking advantage of the lenient standards afforded to *pro se* litigants.⁷⁰ Before engaging in ghostwriting, it is strongly recommended that you review any ethics opinions involving this practice in your jurisdiction or seek such an opinion if there is not one on point.

Even though most federal courts addressing ghostwriting concluded that it violates Rule 11, the same courts declined to sanction the anonymous authors. The courts cited insufficient evidence,⁷¹ or a lack of clearly defined precedent.⁷² Although nascent in development, the authority to sanction ghostwriting includes:

- the inherent power of the court,⁷³
- local rules governing withdrawal of representation,⁷⁴
- the Model Code of Professional Responsibility,⁷⁵ and
- the signature requirement of Rule 11.⁷⁶

Courts have specifically interpreted the purpose of Rule 11(a) as requiring attorneys to sign court documents that they prepared “in any substantial part.”⁷⁷ However, one court acknowledged that if a ghostwriter no longer represented a litigant when the complaint is filed, the author’s failure to sign a complaint “is not at odds with the plain language of Rule 11.”⁷⁸ Advocates should be

⁷⁰*Laremont-Lopez*, 968 F. Supp. at 1078; *Johnson v. Bd. of County Comm’rs*, 868 F. Supp. at 1231.

⁷¹*See Laremont-Lopez*, 968 F. Supp. at 1077.

⁷²*See Duran*, 238 F.3d at 1273; *Ricotta*, 4 F. Supp. 2d at 987-88 (suggesting that local rule, and bar associations should address ghostwriting directly); *Johnson*, 868 F. Supp. at 1227 (declining to impose sanctions despite a finding that attorney engaged in inappropriate ghostwriting).

⁷³*Laremont-Lopez*, 968 F. Supp. at 1077 n.2. *See generally Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795 n.7 (1987) (affirming the inherent authority of courts to punish for contempt).

⁷⁴*Laremont-Lopez*, 968 F. Supp. at 1079.

⁷⁵*Johnson*, 868 F. Supp. at 1232 (suggesting that ghostwriting constitutes “extensive undisclosed assistance to a *pro se* litigant” in violation of MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4)).

⁷⁶*See Fed. R. Civ. P. 11; Wesley v. Don Stein Buick Inc.*, 987 F. Supp. 884, 886 (D. Kan. 1997); *Laremont-Lopez*, 968 F. Supp. at 1078-79; *Johnson*, 868 F. Supp. at 1231 (focusing on the risk that ghostwriting will enable attorneys to sidestep Rule 11’s certification requirement that “allegations and factual contentions have evidentiary support”); Rothermich, *supra* note 66, at 2716-18.

⁷⁷*Johnson*, 868 F. Supp. at 1232. *See also Duran*, 238 F.3d at 1273.

⁷⁸*Laremont-Lopez*, 968 F. Supp. at 1078.



especially wary in jurisdictions that have already addressed ghostwriting since some courts served notice that it might be sanctionable.⁷⁹

At least one court offered a preventive approach for attorneys caught between protecting a *pro se* litigant from default and not being bound to represent the litigant throughout the entire case.⁸⁰ The suggested remedy is simply to sign and file the pleading and “simultaneously fil[e] a motion to withdraw as counsel accompanied by an appropriate explanation and brief.”⁸¹ However, this theoretical escape hatch poses unique problems for legal aid attorneys, who often provide limited service arrangements to clients. In such cases withdrawal may run afoul of the duty not to withdraw if it would cause a “material adverse effect on the interests of the client.”⁸²

C. 28 U.S.C. § 1927

Another basis for sanctions lies in 28 U.S.C. § 1927, which serves “to deter unnecessary delays in litigation.”⁸³ The statute authorizes sanctions in the form of “excess costs, expenses, and attorneys fees” against any attorney who “multiplies the proceedings in any case unreasonably and vexatiously.”⁸⁴ Courts have resorted to Section 1927 more frequently since the statute was amended to include attorneys’ fees.⁸⁵

The scope of authority to sanction under Section 1927 is both broader and narrower than Rule 11.⁸⁶ Section 1927 is broader in that the attorney’s behavior is examined throughout the entire

⁷⁹See *Duran*, 238 F.3d at 1273 (threatening to sanction attorneys for future violations); *Johnson*, 868 F. Supp. at 1232.

⁸⁰*Laremont-Lopez*, 968 F. Supp. at 1077 n.2.

⁸¹*Id.*

⁸²MODEL RULE OF PROFESSIONAL CONDUCT 1.16 (2002). See generally Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URBAN L.J. 1145, 1175-78 (2002), for a discussion of the problems associated with ghostwriting that legal services attorneys face in light of ethical rules recognizing either fully represented parties or *pro se* litigants.

⁸³*Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (internal citations omitted).

⁸⁴*Id.* See also *Dreiling v. Peugeot Motors of America*, 768 F.2d 1159, 1165 (10th Cir. 1985).

⁸⁵28 U.S.C. § 1927, amended by Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156. See generally Janet Eve Josselyn, *The Song of the Sirens—Sanctioning Lawyer Under 28 U.S.C. § 1927*, 31 B.C. L. REV. 477, 478 (1990).

⁸⁶The court’s inherent power to sanction is broader still in that it permits sanctions for conduct beyond the filing of documents or “multiplying” proceedings. Yet, it requires a finding of bad faith. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991).



litigation, as a “course of conduct,”⁸⁷ while Rule 11, as noted above, applies to particular filings.⁸⁸ As a result, a course of conduct can be sanctionable even though the filings during that conduct comport with Rule 11 standards. Section 1927 is narrower because Rule 11 misconduct is based on the party’s or attorney’s objective knowledge, while, in many circuits, Section 1927 requires subjective bad faith.⁸⁹ Some jurisdictions, however, interpret Section 1927 as authorizing sanctions when attorney conduct, “viewed objectively, manifests either intentional or reckless disregard of the attorney’s duties to the court.”⁹⁰

Since Rule 11 and Section 1927 have different standards, courts deciding whether to issue sanctions under both may conduct a separate inquiry into Section 1927 and Rule 11, but a court proceeding *sua sponte* under either rule must give the subject attorney notice and an opportunity to respond.⁹¹ Their “resulting findings must appear with reasonable specificity in terms of the perceived misconduct and the sanctioning authority.”⁹² For example, since Section 1927 sanctions are limited to costs associated with excess litigation, “blanket awards of all fees” may not withstand appellate scrutiny.⁹³

⁸⁷*United States v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of America*, 948 F.2d 1338, 1345-46 (2d Cir. 1991).

⁸⁸The filing of complaint is not sanctionable under Section 1927 because that section applies only to activities occurring after the commencement of litigation. *See Willis v. City of Oakland*, 231 F.R.D. 597 (N.D. Ca. 2005).

⁸⁹*See id.*; *Trulis v. Barton*, 107 F.3d 685, 694 (9th Cir. 1995); *Oliveri*, 803 F.2d at 1273; . Although the matter is not free from doubt, law firms may not be sanctioned under Section 1927. *Claiborne v. Wisdom*, 414 F.3d 715, 723 (7th Cir. 2005).

⁹⁰*Lee v. L.B. Sales Inc.*, 177 F.3d 714, 718 (8th Cir. 1999). *See also Claiborne*, 414 F.3d at 721; *United States v. Knott*, 256 F.3d 20, 31 (1st Cir. 2001); *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc); *Naegele v. Albers*, 355 F. Supp. 2d 129, 145 (D.D.C. 2005)

⁹¹*Johnson v. Cherry*, 422 F.3d 540 (7th Cir. 2005). There is some evidence that courts and movants have sidestepped the procedural requirements of Rule 11, such as the safe harbor rule, to seek and award sanctions under § 1927 without these safeguards. Danielle Kie Hart, *Symposium: Happy (?) Birthday Rule 11: and the Chill Goes On – Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-à-Vis 28 U.S.C. § 1927 and The Court’s Inherent Power*, 37 LOY. L.A. L. REV. 645 (2004).

⁹²*Jones v. Pittsburgh Nat’l Corp.*, 899 F.2d 1350, 1359 (3rd Cir. 1990); *See also Int’l Bhd.*, 948 F.2d at 1316; *United States v. Shuch*, 139 B.R. 57, 62 (D. Conn. 1992).

⁹³*Matter of Yagman*, 796 F.2d 1165, 1184 (9th Cir. 1986) (reversing the district court’s award of fees under Section 1927).



III. Filing the Action

Certain mechanics are involved in filing a complaint in federal court. A particular procedure must be followed for filing for *in forma pauperis* status.

A. FILING AND SERVICE

To file a complaint in the federal district court, you need either to pay the filing fee of \$350 or to file a motion for leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. The district court may also have a form “cover sheet” to be filled in by counsel when the complaint is filed. The cover sheet seeks information about the nature of the case and the existence of any related case or cases. Local rules typically define a “related” case. Counsel, not support staff, should complete the cover sheet. Check your local rules and clerk’s office regarding policies and procedures for the electronic filing and service of documents.

After the complaint is filed, the clerk of the court issues as many summonses as may be necessary.⁹⁴ Plaintiff’s counsel is responsible for effecting service of the summonses and complaint within 120 days of filing the complaint.⁹⁵ Service must be made by a nonparty person older than 18.⁹⁶ When suit is filed against any officer or agent of the United States, three copies of the summonses and complaint must be served.⁹⁷ One copy must be sent by registered or certified mail to the officer or agency if the suit challenges the validity of an order of the agency or officer not made a party to the action. A second copy must be sent by registered or certified mail to the U.S. attorney general. A third copy must be delivered “to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee *designated in a writing filed with the clerk of the court.*”⁹⁸ Delivering a copy to the receptionist in the front office of the U.S. attorney is not sufficient. You should check with the clerk’s office to ascertain whether a filed document designates the person upon whom service may be made. Absent such a document, service should be made upon the U.S. attorney. Service upon a state, municipal corporation, or other governmental organization is made either by serving the chief executive officer or by serving in accordance with the law of the state.⁹⁹

⁹⁴Fed. R. Civ. P. 4(b).

⁹⁵*Id.* 4(c)(1), 4(m).

⁹⁶*Id.* 4(c)(2).

⁹⁷*Id.* 4(i).

⁹⁸*Id.* 4(i)(1)(A) (emphasis added).

⁹⁹*Id.* 4(j)(2).



Federal Rule of Civil Procedure 4(d) encourages individuals, corporations, and associations to waive formal service requirements by imposing the costs of service if they refuse to do so. The request for waiver is initiated by the plaintiff. The plaintiff's request must (1) be written; (2) in conformity with the federal "Notice and Request for Waiver" form, indicating dates and consequences of noncompliance; (3) include a copy of the complaint; (4) contain a copy of the notice; (5) include a prepaid method for the defendant to respond, and (6) be sent by first-class mail or "other reliable means" directly to the individual subject to, or authorized to accept, service.¹⁰⁰ Following this, the defendant has thirty days to respond (sixty days if outside the United States) or will be subject to a motion to recover service expenses and costs. If the defendant returns the waiver, the defendant has sixty days from the date of request to answer (or ninety days if outside the United States).¹⁰¹ This extended time to answer may counsel against seeking waiver in cases that are time-sensitive. This procedure does not apply to the United States, its officers, agents, or other government-related entities.

The complaint may be supplemented by documentary material. If the case involves regulations, handbooks, or other administrative material that are not readily available to the judge, reproduce that material in an addendum to the complaint. Similarly, include in the addendum any correspondence or other documents pertinent to the case. The addendum should be well organized, have a table of contents, be divided by tabs, and be presented in such a way that the judge and the judge's clerks can readily ascertain what material is available and read whatever they wish.

B. IN FORMA PAUPERIS STATUS

Proceeding *in forma pauperis* allows your client to avoid service, filing, and transcript preparation costs if the client can demonstrate inability to pay such fees.¹⁰² The requisite level of indigence is relatively fluid and within the discretion of the court. Several factors that may be relevant are (1) possible aid from friends or relatives, (2) possible aid from charities, (3) regular employment, (4) earning power, (5) unencumbered assets, (6) retention of counsel, and (7) the particular cost relative to the applicant's financial means. When filing *in forma pauperis*, determine if the district court has a form *in forma pauperis* package, consisting of a motion, a statement of points and authorities, a declaration of the plaintiff, and a proposed order. If the court does not supply such forms, you need to submit an affidavit stating your client's assets and inability to pay, as well as the nature of the action, defense, or appeal and belief that your client

¹⁰⁰ *Id.* 4(d)(2).

¹⁰¹ *Id.* 12(a)(1)(B).

¹⁰² *See* 28 U.S.C. § 1915.



is entitled to redress.¹⁰³ *In forma pauperis* motions generally are ruled on by a designated judge without a hearing (and usually without controversy). The complaint is only lodged, not filed, until the motion for leave to proceed *in forma pauperis* is granted. The clerk's office staff tells you when to return for your summonses. Plaintiffs proceeding *in forma pauperis* must have service effected by the U.S. marshal, but this usually involves much delay.¹⁰⁴ Thus, seeking permission from the court to effectuate service yourself is advisable. Only natural persons, not groups or associations, may file motions for *in forma pauperis status*.¹⁰⁵ If the court later determines that the allegations of poverty are untrue, the action is frivolous or malicious, fails to state a claim for which relief can be granted, or monetary redress is being pursued against an individual immune from such relief, the court will dismiss the case.¹⁰⁶ Denials of motion for *in forma pauperis status* are immediately appealable.¹⁰⁷

¹⁰³*Id.* § 1915(a)(1). See *Lister v. Dep't of Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005) (“Section 1915(a) applies to all persons applying for IFP status, and not just to prisoners.”) Prisoners are subject to additional requirements when proceeding *in forma pauperis*. For example, they must submit a certified copy of the trust fund account statement for the preceding six-month period and are sometimes subject to a partial filing fee. See 28 U.S.C. § 1915(a)(2), (b)(1).

¹⁰⁴*Garrett v. Miller*, No. 02-C-5437, 2003 U.S. Dist. LEXIS 5248, 2003 WL 1790954 (N.D. Ill. Apr. 1, 2003); Fed. R. Civ. P.4(c)(2).

¹⁰⁵*Rowland v. Cal. Men's Colony*, 506 U.S. 194 (1993).

¹⁰⁶28 U.S.C. § 1915(e)(2). In addition, prisoners may not file a civil action or appeal a civil judgment if the prisoner has previously filed three or more actions that were dismissed while incarcerated unless the prisoner is “under imminent danger of serious physical injury”). 28 U.S.C. § 1915(g).

¹⁰⁷*Sears, Roebuck & Co. v. Charles W. Sears Real Estate, Inc.*, 865 F.2d 22, 23 (2d Cir. 1988) (noting that “an interlocutory appeal may be taken from an order denying leave to proceed *in forma pauperis* under the [Cohen] doctrine”); *Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1369 (9th Cir. 1987) (accord).

