IN THE UTAH COURT OF APPEALS

HEARTWOOD HOME HEALTH & HOSPICE, LLC,, Plaintiff/Appellant, vs. RITA HUBER, AND GLENNA MOLYNEUX, Defendants/Appellees.	Case No.: 20170221-CA

APPELLEES' BRIEF

Appeal from the Third District Court, Salt Lake County from orders entered by the Honorable John Paul Kennedy.

Gary R. Guelker
Janet I. Jenson
747 East South Temple #130
Salt Lake City, Utah 84102
Telephone 801-579-0801
Counsel for Appellant

Robert H. Wilde
Michael S. Wilde
Blackburn & Stoll, LC
257 East 200 South Suite 800
Salt Lake City, Utah 84111
Telephone: 801-521-7900
Counsel for Appellees

I. PARTIES TO THE PROCEEDING

Defendants and Appellees Glenna Molyneux and Rita Huber

Plaintiff and Appellant Heartwood Home Health & Hospice, LLC.

Defendant Good Shepherd Home care & Hospice

Defendant Merrill B. Nielson

II. TABLE OF CONTENTS

I. Parties to the Proceeding 1

II. Table of Contents 2

III. Table of Authorities 3

IV. Jurisdiction 5

V. Statement of the Issues 5

VI. Pertinent Statutes and Rules 6

VII. Statement of the Case 6

A. Nature of the Case 6

B. Course of Proceedings Below 6

C. Disposition Below 7

D. Relevant Facts 7

VIII. Summary of Argument 9

IX. Argument 10

A. Rule 11 10

1. Heartwood Misstates the Rule 10

2. The District Court Properly Awarded Damages Under Rule 11 11

3. Utah 11 Rule Supports Molyneux and Huber 14

B. The Trial Court Properly Granted Summary Judgment 17

1. Heartwood is Bound by it's Rule 30(b)(6) Testimony 17

2. Heartwood is Subject to the Sham Affidavit Doctrine 18

3. The Claims Fail Legally 19

4. Utah's Employment Restriction Law Applies 19

5. Breach of Contract 21

6. HIPAA 22

7. Fiduciary Duty 22

8. Interference with Contract 23

C. Molyneux and Huber are Entitled to Attorneys' Fees on Appeal 24

1. Motion for Attorneys' Fees 24

2. Attorneys' Fees Were Awarded Below 25

D. Conclusion 25

III. TABLE OF AUTHORITIES

Rule 11, Utah R. Civ. P. 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 25, 26

Rule 30, Utah R. Civ. P. 8, 10, 12, 14, 17, 18, 19, 25

Rule 52, Utah R. Civ. P. 6, 7

Rule 56, Utah R. Civ. P. 6, 16

Rule 3.7 Utah R. Prof'l Conduct 11

Rule 33, Utah R. App. P. 24

Automobile Assur. Fin. Corp. v. Syrett Corp., 1997 U.S. App. LEXIS 2072 (10th Cir.

Utah Feb. 7, 1997) 16

Eldridge v. Johndrow, 2015 UT 21, 345 P.3d 553 24

Espinoza v. Gold Cross Servs., 234 P.3d 156, 158 (Utah Ct. App. 2010) 22

Findlay v. Banks (In re Cascade Energy & Metals Corp.), 87 F.3d 1146, 1149 (10th Cir. Utah 1996) 16, 17

Heartwood Home Health & Hospice v. Huber, 2016 UT App 183 7

Herron v. Jupiter Transp. Co., 858 F.2d 332, 335-36 (6th Cir. 1988) 15

IHC Health Servs., Inc. v. D & K Mgmt., Inc., 2008 UT 73, ¶ 19, 196 P.3d 588 17

K.F.K. v. T.W., 2005 UT App 85, P8 (Utah Ct. App. 2005) 25

Kaplan v. DaimlerChrysler, A.G., 331 F.3d 1251, 1255 (11th Cir. Fla. 2003) 13

Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982) 24

Morse v. Packer, 1999 UT 5, ¶ 10, 973 P.2d 422 5

Phonometrics, Inc. v. Economy Inns of Am., 349 F.3d 1356, 1362 (Fed. Cir. 2003) 16

Prince, Yeates & Geldzahler v. Young, 2004 UT 26, 94 P.3d 179 22

Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1294 (11th Cir. 2002) 13

Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982) 20

Scenic Aviation, Inc. v Blick 2003 U.S. Dist. LEXIS 28009 20

Shirvell v. Gordon, 602 Fed. Appx. 601, 604-605 (6th Cir. Mich. 2015) 15

Spencer Law Office, LLC v. Dept. of Workforce Services, 2013 UT App 138 23

Thomas v. Oreck, Inc., 2010 U.S. Dist. LEXIS 25311 (D. Utah Mar. 17, 2010) 18

Uintah Basin Med. Ctr. v Hardy, 2005 UT App 92 ; 110 P.3d 168 19

Utah Dep't of Social Servs. v. Adams, 806 P.2d 1193, 1197 (Utah Ct. App. 1991) 25

Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998) 25

Webster v. Sill, 675 P.2d 1170 (Utah 1983) 19

West v. Thomson Newspapers, 872 P.2d 999, 1004 (Utah 1994) 5

Wilkerson v. Shinseki, 606 F.3d 1256, 1267 (10th Cir. 2010) 22

IV. JURISDICTION

Molyneux and Huber do not contest this court's jurisdiction and concur with Heartwood's statement of jurisdiction.

V. STATEMENT OF THE ISSUES

Molyneux and Huber believe the issues are better stated as: did the trial court err when it granted summary judgment and did the trial court err when it granted the Rule 11 Utah R. Civ. P. motion and awarded attorneys' fees?

The standard of review for evaluating Rule 11 sanctions involves includes "(1) findings of fact are reviewed under the clearly erroneous standard; (2) legal conclusions are reviewed under the correction of error standard; and (3) the type and amount of sanction to be imposed is reviewed under an abuse of discretion standard." *Morse v. Packer*, 1999 UT 5, ¶ 10, 973 P.2d 422

Summary judgment presents questions of law, which are reviewed for correctness. *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994).

These issues are reserved for appeal in the memoranda and trial court's respective orders. [R297, 508, 555, 584, 625, 697]

VI. PERTINENT STATUTES AND RULES

Rule 11, Utah R. Civ. P.; Rule 52, Utah R. Civ. P.; Rule 56, Utah R. Civ. P. Each of these is included in Molyneux and Huber's Addendum.

VII. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a civil action whereby Heartwood sought damages and an injunction from Employees after they left its employ and went to work elsewhere.

B. COURSE OF PROCEEDINGS BELOW

This matter was filed in the Third District Court on November 1, 2012. [R 1] During the summer of 2013, the depositions of the parties were taken and the fact discovery cutoff ran on August 12, 2013. [R 38] On October 15, 2013, Molyneux and Huber submitted their Rule 11 Motion to Heartwood's counsel under the safe harbor provision of Rule 11(c)(1)(A). [R 441] On November 8, 2013, Molyneux and Huber filed their Motion for Summary Judgment. [R 297-314].

After briefing and a hearing, the trial court granted Molyneux and Huber's Motion for Summary Judgment and dismissed Heartwood's claims against Molyneux and Huber. [R 584] See Appellant's Brief at 21. At the hearing on the Motion for Summary Judgment, Heartwood advised the Court and Molyneux and Huber, for the first time, after

Molyneux and Huber had briefed and prepared argument, that it was dropping all claims against Molyneux and Huber other than the claims that Huber had solicited employees and that Molyneux had solicited patients. [R 585, 1056] See also Appellant's Brief at 21. Molyneux and Huber' Rule 11 Motion was then heard and granted. [R467, 679–684] In ruling on each of the motions the trial court's order contained the court's own multi-page explanation of reasoning as contemplated by Rule 52, Utah R. Civ. P. [R584-590, 679-684]

Heartwood then appealed the Rule 11 ruling to this court. The court held that it did not have jurisdiction over that appeal and that appeal was rejected at *Heartwood Home Health & Hospice v. Huber*, 2016 UT App 183. [R762-770]

After the matter was returned to the trial court, Molyneux and Huber filed a suggestion of death as to Mr. Nielson. [R776] The remaining defendant, Good Shepard Home Care & Hospice, Inc. was dismissed on an order to show cause. [R 978]. Once final orders were entered as to all parties, Heartwood filed this appeal on March 13, 2017. [R985]

C. DISPOSITION BELOW

Heartwood's claims against Employees were dismissed with prejudice and on the merits in response to Employees' Motion for Summary Judgment. [R580] Attorneys' fees were then awarded to Employees in response totheir Rule 11 Motion. [R697]

D. RELEVANT FACTS

During the summer of 2012, Molyneux and Huber worked for Heartwood as a registered nurse (RN) (Huber) and a home health aide (Molyneux). [R14-15] Defendant Merrill Nielson was also employed as an RN. [R15] Prior to filing this action, Heartwood learned that Nielson had left its employ and Heartwood supposedly had video tape of Nielson making photocopies of its records prior to his departure. [R341] Despite Heartwood's promise to produce the video at page 76 of Heartwood's deposition, it was never produced [R341] and there were no substantiated allegations that either Huber or Molyneux took Heartwood records. See Heartwood's Opening Brief at page 24. These were among the allegations Heartwood dismissed during the summary judgment hearing. [R585]

The defendants noticed the deposition of Heartwood under Rule 30(b)(6), Utah R. Civ. P. and the notice advised that the deposition would include questions relating to the allegations of the complaint pertaining to each defendant. [R317-19] In Heartwood's deposition, defense counsel went through the factual allegation paragraphs one at a time and asked Mr. Vasic, Heartwood's president and designated Rule 30(b)(6) witness, about the facts which supported the allegations. These are summarized at [R557-580]. In virtually ever instance, Vasic responded that there were no facts supporting the allegations or that the allegations was just assumptions. [R328-352]

Mr. Vasic further testified that Ms. Molyneux did not recruit Heartwood's patients before she left Heartwood's employ. [R300, 349]. Mr. Vasic's testimony was distilled in

Molyneux and Huber's memorandum supporting their Rule 11 motion to show that in at least 22 instances he testified that Heartwood had no facts to support key elements of its case. [R557-560]

In the deposition of Heartwood, defense counsel further asked Vasic about the legal basis for its claims and was told they were based on the contracts and on HIPAA. [R345-52].

Molyneux resigned from Heartwood's employ on October 19, 2012. [Appellant's Brief at 15. Huber had left at the end of July. [R403] Anything Molyneux and Huber did which Heartwood claims to form the basis for its complaint occurred after they left Heartwood's employ. Brief page 20.

VIII. SUMMARY OF ARGUMENT

The trial court properly sanctioned Heartwood under Rule 11, Utah R. Civ. P. and awarded attorneys fees against it. By the time the Rule 11, Utah R. Civ. P., Motion was filed, it was clear that the allegations of the complaint made on information and belief had no support. It was further obvious that Heartwood's President had completely undercut virtually every substantive allegation by his deposition testimony in which he stated that there were no facts to support them.

Rule 11 requires counsel and parties to be aware of the support for their allegations and to modify their pleadings and/or other papers when it appears they lack support. Filing papers which lack support and advocating positions which lack support each

violate Rule 11 Utah R. Civ. P., and may subject offenders to sanctions.

Where a party takes a firm position in its Rule 30(b)(6) Utah R. Civ. P. deposition, it may not undercut that testimony with sham affidavits. There are at least three different points at which a party being deposed may take steps to assure that its testimony is correct. Failing to take advantage of those steps will leave the party bound by its testimony.

Molyneux and Huber were awarded attorneys' fees by the trial court for their efforts in the Motion for Summary Judgment. Because they were awarded attorneys' fees by the trial court they are entitled to attorneys' fees on appeal.

IX. ARGUMENT

A. RULE 11

1. HEARTWOOD MISSTATES THE RULE

At page 37 of Heartwood's Opening Brief, it argues for its interpretation of Rule 11 Utah R. Civ. P. It purports to tell us what the rule says.

> "This is because the plain language of Utah's Rule 11 only authorizes sanctions for "presenting" a document in violation of the Rule:
>
> > By presenting a **pleading ... to the court ... an attorney ... is certifying** that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. [Emphasis added]

Utah R.Civ. P. 11(b)."

In reality Rule 11(b) Utah R. Civ. P. reads somewhat differently. The introductory portion of Rule 11(b) actually says is the following.

> By presenting a pleading, written motion, or other paper to the court (**whether by signing, filing, submitting, or advocating**), 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, [Emphasis added]

The omission of the term "or advocating" by the use of ellipses is not insignificant here. One of the methods by which Molyneux and Huber claim Heartwood violated Rule 11(b) Utah R. Civ. P. was by counsel advocating a baseless position in response to the Motion for Summary Judgment. Submission of the opposing memorandum and counsel's affidavit included signing, filing, submitting and advocating, and thus presenting an "other paper" including advocating the content of that memorandum.[1] Then, arguing, at oral argument, the contents of those documents was an additional instance of advocating.

By the intentional excision of the operative language from Rule 11(b) Utah R. Civ. P. Heartwood has clearly, and intentionally, misstated the law.

2. THE DISTRICT COURT PROPERLY AWARDED DAMAGES UNDER RULE 11

In analyzing Heartwood's arguments on Rule 11, it helps to consider the state of the litigation at the time the Motion was heard by the trial judge.

a. Heartwood had filed a complaint in which a number of its allegations were

---

[1]The use of counsel's affidavit raises the question of whether he is now barred from representing Heartwood by the provisions of Rule 3.7 Utah R. Prof'l Conduct.

pled on "information and belief." [R16-19]

b. Heartwood's counsel had sat through the depositions of Molyneux and Huber where they had denied stealing clients or Heartwood's employees. [R394, 417]

c. Heartwood's President had testified adversely to his cause on at least 25 substantive points. [R557-560]

d. The damaging testimony of Heartwood's President had not been corrected or softened as allowed by Rule 30(e),Utah R. Civ. P. [R322-355}

e. Molyneux and Huber's counsel had sent Heartwood's counsel a Rule 11 Motion availing his clients of the 21 day safe harbor provision of the rule, asking that Molyneux and Huber be dismissed from the suit and advising that a Summary Judgment Motion would follow unless Heartwood dismissed Molyneux and Huber. [R1106]

Notwithstanding this background, Heartwood takes the position that it needed to do nothing because it thought it had a case a year before when it filed suit.

The thrust of Heartwood's position is that once a complaint is filed which minimally meets Rule 11's standard, a party and its counsel are free from Rule 11's obligations regardless of what happens thereafter. Heartwood's position ignores the language of the rule and its interpreting case law. Rule 11(b) Utah R. Civ. P. describes the scope of the rule as "... presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating)..." Filing a complaint is not the sole triggering event. Filing any pleading, written motion, or "other paper" suffices. In

this case those "other papers" certainly include Plaintiff's Memorandum in Opposition to Defendants Motion for Summary Judgment (R464), and other various papers signed by Heartwood's counsel thereafter. After the Vasic Rule 30(b)(6) deposition, Heartwood's counsel was aware of the complete lack of evidence to support Heartwood's claims, and it became his obligation to dismiss the complaint against Molyneux and Huber or deal with the consequences.

The determination of whether an action violates Rule 11 is an objective inquiry *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002); *Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 1255 (11th Cir. Fla. 2003). Heartwood's counsel's view that he thought all was well is insufficient. Another competent lawyer and/or judge would also need to be believe the case could survive. The trial judge here did not.

Heartwood's argument also focuses on the time at which the Rule 11 motion was submitted. See Heartwood's opeining brief at 34-35. The relevant date for this discussion is the date on which Heartwood's right to amend its deposition answers ran which was September 19, 2013. [R322] Heartwood received Molyneux and Huber's Rule 11 Motion on October 15th [R563]. [2]

Heartwood suggests its actions were reasonable in light of the limited time it had

---

[2]Heartwood's discussion about the timing of the Rule 11 Motion is contained at pages 34-35 of its Opening Brief. The timing of the Rule 11 Motion was not raised before the trial court and has not been reserved for appeal. [R602-620]

to prepare the complaint in order to stop the transfer of its clients. Again, the correct time to consider was October 15, 2013. The complaint in this matter was filed on November 1, 2012. Heartwood's Rule 30(b)(6) Utah R. Civ. P. deposition was taken on August 22, 2013. Heartwood had almost two full months to digest the testimony its president had given on its behalf. Heartwood made no corrections to the deposition during the 28 days allowed by Rule 30(e), Utah R. Civ. P. [R322]

3. UTAH 11 RULE SUPPORTS MOLYNEUX AND HUBER

Federal Advisory Committee notes on 1993 amendments previously suggested; "[o]rdinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely." Utah's version of Rule 11 tracks the federal rule. This clearly shows that signing post-complaint papers may be the basis for a motion.

The note to the federal 1993 amendment addressed this issue further.

> The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, **if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention**. [emphasis added].

Other courts which have addressed this issue also take the position advocated by Molyneux and Huber.

> [The duty to press only valid claims] ... does not end when the pleadings are filed. Rather, the plaintiff is impressed with a continuing responsibility to review and reevaluate his pleadings and where appropriate modify them to conform to Rule 11. In other words, the Rule imposes on litigants a continuing duty of candor, and a litigant may be sanctioned for continuing to insist upon a position that is no longer tenable. [citations omitted] *Shirvell v. Gordon,* 602 Fed. Appx. 601, 604-605 (6th Cir. Mich. 2015).
>
> . . .
>
> In *Herron v. Jupiter Transp. Co.*, 858 F.2d 332, 335-36 (6th Cir. 1988), this court stated that the reasonable inquiry under Rule 11 is not a one-time obligation. The plaintiff is impressed with a continuing responsibility to review and reevaluate his pleadings and where appropriate modify them to conform to Rule 11.

Heartwood's argument is significantly weakened by the fact that virtually all of its cited cases and treatises were decided prior to the 1993 amendment to Federal Rule 11. The compiler's note to Utah Rule 11 states that the Utah rule is substantially similar to its federal counterpart. The committee comment to the 1993 amendment to the federal rule, which presumptively applies to the Utah rule, provides: "It also, however, emphasizes the duty of candor by **subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention**." [Emphasis added] Heartwood's pre-1993 cases are irrelevant to this discussion.

Rule 11 is invoked " [b]y presenting a pleading, written motion, or other paper to

the court (whether by signing, filing, submitting, or advocating) ..." Rule 11(b) Utah R. Civ. P. Heartwood's response to the Motion for Summary Judgment was by way of other papers which were signed asserting the legal and factual substance of Heartwood's position in response to the Rule 56, Utah R. Civ. P. Motion. Thereafter, Heartwood's counsel appeared and argued against summary judgment even though his client had testified there were no facts to support its claims. *Phonometrics, Inc. v. Economy Inns of Am.*, 349 F.3d 1356, 1362 (Fed. Cir. 2003). (advocating an unsupported position is a violation of Rule 11(b)). *Phonometrics* further notes the change in the standard arising from the 1993 amendment. *Id* at 1362.

Heartwood suggests that the trial court ruled against it on the Rule 11 Motion based on the content of its complaint. The record says otherwise. The trial court's findings listed at page four of its order on the Rule 11 Motion (R682) show that the trial court did not base its decision on the fact that the content of the complaint was wrong when the complaint was filed. Rather, because "Heartwood reaffirmed and later advocated based on these allegations in opposing these Defendants' motion for summary judgment." *Id.* See also facts numbered 3, 4, 5, 6, 7, and 8.

It bears mentioning that the Tenth Circuit Court of Appeals has imposed the continuing duty standard on Utah lawyers since at least 1996. See *Automobile Assur. Fin. Corp. v. Syrett Corp.*, 1997 U.S. App. LEXIS 2072 (10th Cir. Utah Feb. 7, 1997) (sanctioning Utah lawyer Parker Nielson for continuing to press baseless claims); *Findlay*

v. Banks (In re Cascade Energy & Metals Corp.), 87 F.3d 1146, 1149 (10th Cir. Utah 1996) (sanctioning Utah lawyer Delno Finlay for post complaint violations);

In short, once it was pointed out to Heartwood's counsel that Mr. Vasic testified Heartwood had "no facts," his arguing otherwise fell within the "advocating" preclusion of Rule 11(b). This opened his client, and himself, to a sanctions award.

The trial court properly granted the Rule 11 Utah R. Civ. P. Motion and awarded attorneys' fees.

B. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT

Heartwood's argument opposing summary judgment is grounded in its position that the information it offered is sufficient to get past summary judgment because of inferences which may be drawn from it. On summary judgment, Courts are not required to draw every possible inference of fact, no matter how remote or improbable, in favor of the nonmoving party. *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 19, 196 P.3d 588. (The word "genuine" indicates that a district court is not required to draw every possible inference of fact, no matter how remote or improbable, in favor of the nonmoving party. Instead, it is required to draw all reasonable inferences in favor of the nonmoving party.)

1. HEARTWOOD IS BOUND BY ITS RULE 30(b)(6) TESTIMONY

Not surprisingly, Heartwood's Brief does not deal with the impact of its Rule 30(b)(6) testimony on its defense of Molyneux and Huber's Motion for Summary

Judgment. Heartwood had at least three opportunities to avoid the impact of Mr. Vasic's multiple answers that it had no evidence to support the allegations of the operative paragraphs of its complaint. First, Mr. Vasic should have been prepared. Preparing a Rule 30(b)(6) witness is not just common sense, it is required. *Thomas v. Oreck, Inc.*, 2010 U.S. Dist. LEXIS 25311 (D. Utah Mar. 17, 2010) (holding a party is required to prepare its witnesses for depositions noticed under Rule 30(b)(6).)

During the deposition, Mr. Vasic was free to break and speak with his counsel if he had any questions. Counsel was present during the entire deposition and presumably listened to the questions and the answers. At page 56 of the deposition [R336] a break was taken during Heartwood's deposition and counsel had the opportunity to speak with Mr. Vasic if he had any concerns about the nature of the answers. A second break was taken at page 97 of the deposition. [R347] Much of the "no facts" testimony occurred before the second break. [R322-47] Mr. Vasic was sworn at the beginning of the deposition so we have every reason to believe his testimony was truthful.

After Mr. Vasic finished testifying, Heartwood had the opportunity to read and amend the deposition under Rule 30(e). No changes were ever submitted. Had Heartwood wished to avail itself of the provisions of Rule 30(e) it would have needed to provide an explanation for each proposed change. No explanation was submitted which would suggest that the testimony was erroneous or incomplete in any fashion.

2. HEARTWOOD IS SUBJECT TO THE SHAM AFFIDAVIT DOCTRINE

Utah has recognized the sham affidavit doctrine for at least 35 years. See *Webster v. Sill*, 675 P.2d 1170 (1983). In *Webster v. Sill* the court explained this doctrine. "... when a party takes a clear position in a deposition , that is not modified on cross-examination , he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy." at 1172. Language in *Uintah Basin Med. Ctr. v Hardy*, 2005 UT App 92 ; 110 P.3d 168, ¶14 fn 1 shows that "own affidavit" means affidavits submitted on the party's behalf as opposed to an affidavit of the party personally. Having taken clear and unequivocal positions on the evidence in response to questions asked in Mr. Vasic's deposition Heartwood may not later attempt to rebut those positions with other evidence.

Absent admissible evidence not precluded by the sham affidavit doctrine, Heartwood had no evidence to rebut Molyneux and Huber's Motion for Summary Judgment and Molyneux and Huber's Motion was correctly granted by the trial court.

3. THE CLAIMS FAIL LEGALLY

In addition to the evidentiary problems associated with Heartwood's Rule 30(b)(6) deposition and sham affidavit submissions, its claims against Molyneux and Huber fail to state a claim upon which relief may be granted.

4. UTAH'S EMPLOYMENT RESTRICTION LAW APPLIES

Though the "contracts" are not labeled "non-competition agreement" they seek to restrict the employment of Molyneux and Huber nonetheless. In the 2003 opinion in

Scenic Aviation, Inc. v Blick 2003 U.S. Dist. LEXIS 28009 Judge Cassell described the state of Utah law on employment restrictions in denying the employer's attempts to keep employees from working for a competing small air carrier.

Rather than refer to the restrictions as non-competition agreements, *Scenic Aviation* uses the broader term "restrictive employment covenants and applies that description to attempts to hamper employees in future employment. *id* at *14. *Scenic Aviation* notes that under Utah Supreme Court case law restrictions which are designed to limit competition or restrain the right to engage in a common calling are not enforceable. *id* at *15.

A restrictive covenant may not be enforced against a former employee unless that employees services are "special, unique, and extraordinary." *id* at18-19 Nothing in the work Molyneux and Huber did as a registered nurse or a certified nurse's assistant meets that description. Heartwood did not argue as much before the trial court and does not do so in it briefing here. Rather, Mr. Vasic testified that the actions of Molyneux and Huber were merely part of economic competition and not the result of any ill will. [R302, 353]

In *Robbins v. Finlay*, 645 P.2d 623, 627 (Utah 1982), the Utah Supreme Court analyzed the law on restrictive employment agreements. It held that, to be enforceable, such agreements must be reasonable as to time and geographic coverage. There is no time or geographic limitation on the "contracts." Presumably, it is Heartwood's view that it can restrict its former employees from eating lunch together for the rest of their lives.

Utah law on restrictive employment contracts trumps all of Heartwood's causes of action seeking to keep Molyneux and Huber from working elsewhere and associating with their friends who previously worked for Heartwood.

5. BREACH OF CONTRACT

Heartwood asserts that two documents are contracts which Molyneux and Huber breached. The first is the Employee Handbook which clearly states, at page 24, "I understand that this Handbook represents only current policies and benefits, and that it does not create a contract of employment." [R368, 585] Heartwood, having specifically disavowed the handbook as a contract, may not now seek to enforce it as such.

The second document Heartwood seeks to rely on for its breach of contract claim is a Confidentiality Agreement which claims on its face that it is a contract between Heartwood's employees and their supervisor. The trial court rejected this contract claim noting that the supervisor was not a party to the alleged contract. He construed the document according to its terms and against Heartwood to the extent the document was unclear. [R585]

The contracts describe the relief available in the event of a breach. That relief is limited to termination or discipline by Heartwood. [R585] Mr. Vasic testified that the relief for violating the "contracts" was that which is stated within the contract. [R350-51] The only relief in the contracts is termination or discipline.[R368-391] Molyneux and Huber are no longer Heartwood's employees and may not be terminated or disciplined by

Heartwood.

The "contracts" both seek to restrict aspects of Molyneux and Huber's employment and ability to work. While not titled "noncompetition agreement" they are subject to the same restrictions Utah courts have put on noncompetition agreements.

6. HIPAA

Heartwood spends several pages discussing HIPAA, stating its claims are not based on that Act. Appellant's Brief at 51-53. Mr. Vasic was questioned about the application of HIPAA to Heartwood's claims against Molyneux and Huber. At pages 104-105 of his deposition, he was asked; "One of the recurring themes in your complaint is confidential and proprietary information. It is my understanding that the basis for the claim that it's confidential and proprietary is that it is covered by HIPAA, is that correct?' Mr. Vasic's response was unequivocal, "Yes" [R348-49]

It is well settled law that HIPAA does not support a private right of action. *Espinoza v. Gold Cross Servs.*, 234 P.3d 156, 158 (Utah Ct. App. 2010); *Wilkerson v. Shinseki*, 606 F.3d 1256, 1267 (10th Cir. 2010). Heartwood has no legal basis for its claims based on HIPAA.

7. FIDUCIARY DUTY

Utah case law is clear that an employee's fiduciary duty ends at the termination of employment, absent unique circumstances which are not present here. *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, 94 P.3d 179. Heartwood acknowledges in its Opening

Brief that all of the events of which they complain occurred after Molyneux and Huber employment was terminated. Appellant's Brief at 10, 20. In *Spencer Law Office, LLC v. Dept. of Workforce Services*, 2013 UT App 138 ¶14-17 this court elaborated on the fiduciary duty of loyalty as it applies in this case.

> . . . for although an employee should not compete with the employer for whom he still works, the employer's right to demand and receive loyalty must be tempered by society's legitimate interest in encouraging competition. . . . an employee may properly plan to go into competition with his employer and may take active steps to do so while still employed and has no general duty to disclose his plans to his employer and, further, that he may secretly join other employees in the endeavor without violating any duty to his employer. *id* at ¶17.

A further failing of Heartwood's position is that Mr. Vasic testified in his deposition that the duty of loyalty was based upon standards set by HIPAA as was the breach of confidentiality claim. [R350, 560] As discussed above, HIPAA may not form the basis of a private civil action.

While they were employed by Heartwood, Molyneux and Huber may have had a fiduciary duty to Heartwood. Once their employment ended, their fiduciary duty did as well. Heartwood's claim for breach of fiduciary duty fails to state a claim upon which relief may be granted, regardless of the alleged factual support.

8. INTERFERENCE WITH CONTRACT

As with its other alleged causes of action, Heartwood's contractual interference claim fails because Mr. Vasic testified there were no facts to support it. As with its breach of contract claim and its breach of fiduciary duty claim, the contractual interference claim

fails to state a cause upon which relief may be granted.

Heartwood cites the court to *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982) as the basis for its contractual interference claim. While Leigh Furniture was the watershed case of this cause in Utah it has since been modified. *Eldridge v. Johndrow*, 2015 UT 21, 345 P.3d 553. The Supreme Court modified the elements of this claim. The improper motive element was removed and only the improper means element remains. The testimony in this case was clear, regardless of the allegations against Ms. Huber, no one left Heartwood's employ at her urging. Those who did leave, Ms. Molyneux and Mr. Neilson, left only after they discovered the added compensation and benefits offered by the new employer. Further, the employees who did leave left long after Ms. Huber had left Heartwood's employ and thus long after anything Ms. Huber did was an improper means.

C. MOLYNEUX AND HUBER ARE ENTITLED TO ATTORNEYS' FEES ON APPEAL

1. MOTION FOR ATTORNEYS' FEES

Pursuant to Rule 33(c)(1) Utah R. App. P., Molyneux and Huber move the court for an order awarding them their attorneys' fees on appeal and remanding this matter to the trial court for the determination of the proper amount of those attorneys' fees. This motion is grounded in Utah case law awarding attorneys' fees on appeal where attorneys' fees were awarded by the trial court.

2. ATTORNEYS' FEES WERE AWARDED BELOW

Molyneux and Huber were awarded attorneys' fees below [R683-84] and should be awarded them on appeal. In *K.F.K. v. T.W.*, 2005 UT App 85, P8 (Utah Ct. App. 2005), the court addressed the award of attorneys' fees where counsel had prevailed on a Rule 11 Motion in the trial court which was then taken on appeal by the opponent. The court awarded that attorney his attorneys' fees on appeal noting that because he had been awarded attorneys' fees by the trial court he would also be awarded his attorneys' fees on appeal. *See also*, *Utah Dep't of Social Servs. v. Adams*, 806 P.2d 1193, 1197 (Utah Ct. App. 1991); *Valcarce v. Fitzgerald*, 961 P.2d 305, 319 (Utah 1998). Molyneux and Huber base their claims for attorneys' fees on the law of *K.F.K.* as applied to Rule 11.

D. CONCLUSION

The undersigned can count on one hand the number times he has filed a Rule 11 Motion in his 38+ years of practice. Molyneux and Huber are two working-class women, an registered nurse and a home health aide, who left one job to pursue another with better pay and benefits. This upset their former employer who sued them based upon guesses and supposition This lawsuit has forced Molyneux and Huber to incur tens of thousands of dollars in attorneys fees to defend factually and legally deficient claims. After an opportunity for discovery, Heartwood testified 22 times under oath that it had no evidence to support the claims it had made.

At least as soon as the 30(b)(6) deposition, Heartwood should have dismissed

Molyneux and Huber voluntarily. It did not. Heartwood should have dismissed Molyneux and Huber upon receipt of the Rule 11 Motion in the safe-harbor period. It did not. Instead, with the factual foundation of 22 assertions that there were "no facts," Heartwood continued to pursue those claims.

Heartwood's appeal should be denied and the matter remanded to the trial court with an order that it determine the proper amount of attorneys' fees on appeal.

Dated this 29th day of September, 2017.

Robert H. Wilde
Attorney for Appellees Molyneux and Huber

ADDENDUM

Order on Summary Judgment - [R584]

Order on Rule 11 Motion [R679]

Heartwood Employee Handbook [R368]

Rule 11 Utah R. Civ. P.

Rule 11 Fed. R. Civ. P.

Form 17. Certificate of Compliance With Rule 24(f)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:

this brief contains *5192* words, excluding the parts of the brief exempted by ~~Utah R. App. P.24(f)(1)(B)~~.

Attorney's or Party's Name

Dated: September 29, 2017

ADDENDUM

The Order of Court is stated below:
Dated: March 11, 2014 04:54:51 PM /s/ John Paul Kennedy District Court Judge

ROBERT H. WILDE #3466
MICHAEL S. WILDE #14366
BLACKBURN & STOLL, LC
257 East 200 South Suite 800
Salt Lake City, Utah 84111
Telephone: 801-521-7900
rwilde@blackburn-stoll.com
mwilde@blackburn-stoll.com

Attorneys for Defendants Huber and Molyneux

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HEARTWOOD HOME HEALTH & HOSPICE, LLC,, Plaintiff, vs. MERRILL B. NIELSON, RITA HUBER, GLENNA MOLYNEUX, GOOD SHEPHERD HOME CARE & HOSPICE, INC., Defendant.	ORDER Civil No.: 120907379 Judge: John Paul Kennedy

This matter came on regularly before the Court on the 25TH day of February, 2014 at the hour of 8:30 a.m. for consideration of Defendant Huber and Defendant Molyneux's Motion for Summary Judgment. The Plaintiff was represented by Gary Guelker. Defendants Huber and Molyneux were represented by Robert H. Wilde. The Court having reviewed the memoranda filed, listened to the argument of counsel and having reviewed the affidavits and evidence filed in support and opposition

thereof and having good cause appearing therefore the Court provides, pursuant to Rule 52(a) Utah R. Civ. P., a statement of the grounds upon which the Court has ruled.

Plaintiff sued Defendant Huber and Defendant Molyneux for, 1) breach of employment contract, 2) breach of duty of loyalty, 3) breach of duty of confidentiality, 4) intentional interference with contract, and 5) for injunctive relief. At oral argument Plaintiff's counsel advised the Court and counsel that Plaintiff's claims had been narrowed and that Defendant Huber was being sued only for having solicited Plaintiff's employees who then went to work for Defendant Good Shepherd and Defendant Molyneux was being sued only for having solicited Plaintiff's patients who then left Plaintiff to work for Defendant Good Shepherd. Each of the actions of which Plaintiff complains is alleged to have occurred after the Defendants' employment with Plaintiff ended.

The bases for the claims were two documents prepared by the Plaintiff, an Employee Handbook and a Confidentiality/Non-Disclosure Agreement. The Employee Handbook shows on its face, at page 24, that "it does not create a contract of employment" and thus cannot form the basis for any contract related claim. Plaintiff's president testified in the Plaintiff's deposition that the relief available for violation of the provisions of these documents was contained within the documents. Each of these documents shows on its face that violation of the terms could lead to revocation of access to Plaintiff's document, discipline, or termination. The documents describe no other relief. The Confidentiality/Non-Disclosure Agreement states that there exists a contract between the employee and the employee's supervisor but no supervisor has been made a party to this action. The Court has construed these documents according to their terms and, failing that, has construed them against the Plaintiff who drafted them or had them drafted. *Edwards & Daniels Architects v.*

Farmers' Properties, 865 P.2d 1382, 1386 (Utah Ct. App. 1993).

As to Defendant Molyneux, Plaintiff asserts that it produced evidence from which the Court could infer that she took Plaintiff's patients by soliciting them to go to Good Shepherd in violation of a contract, a duty of confidentiality, a duty of loyalty, or by interfering with their contracts with Plaintiff. The Court noted that notwithstanding Plaintiff's claim that there were between six and eight such patients the Plaintiff failed to depose any of these patients or their family members concerning the reasons they moved to Good Shepherd even though the Plaintiff had all the information it would have needed to locate and depose these patients. No testimony from any of these patients was offered to oppose the motion for summary judgment. The production of weak evidence when strong evidence is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States*, 4 How. 242, 247. Silence then becomes evidence of the most convincing character. *Runkle v. Burnham*, 153 U.S. 216, 225; *Kirby v. Tallmadge*, 160 U.S. 379, 383; *Bilokumsky v. Tod*, 263 U.S. 149, 153, 154; *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 111, 112; *Mammoth Oil Co. v. United States*, 275 U.S. 13, 52; *Local 167 v. United States*, 291 U.S. 293, 298; *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (U.S. 1939).

During the Rule 30(b)(6) Utah R. Civ. P. deposition of the Plaintiff given by Plaintiff's president Lee Vasic, the witness was asked, at page 80, lines 5-11, what evidence the Plaintiff had to support its allegations in paragraph 21 of the complaint that Defendant Molyneux had solicited patients at Good Shepherd's behest. He answered "there are no facts" and was asked "just the assumption?" to which he answered "just the assumption ..." Based on Plaintiff's uncorrected deposition testimony that the allegations were based on assumption the Court declines to infer or

conclude Defendant Molyneux solicited Plaintiff's patients as alleged in the complaint. Even if she had done so that solicitation, coming after her employment with Plaintiff was terminated, would not have been in violation of any enforceable agreement or principal of law.

As to Defendant Huber, the Plaintiff alleges that she solicited Plaintiff's employees to work for Good Shepherd in violation of her employment contract with Plaintiff. Again the Court notes that the Handbook specifically states that it is not a contract so it may not form the basis for this claim and the Confidentiality/Non-Disclosure Agreement limits its coverage to internal discipline or termination by the Plaintiff. The Plaintiff's evidence was that Defendant Huber and some of the Plaintiff's employees went to lunch after Defendant Huber began working for Good Shepherd and thereafter her friends sought employment with Good Shepherd. Defendant Huber denied soliciting employees to come to work for Good Shepherd and Defendants Molyneux and Nielson each testified that they did not seek work at Good Shepherd because they were solicited by Huber but because the terms and conditions of employment were better there.

In the Plaintiff's deposition Mr. Vasic was asked about the allegations of paragraph 15 of the complaint in which the Plaintiff alleged that Defendant Huber was employed by Good Shepherd to solicit Plaintiff's employees. At page 63, lines 5-12, he was asked "The allegation is that Good Shepherd hired Ms. Huber, the only reason that Good Shepherd hired her is because she agreed to contact Heartwood, so your employees, to persuade them to begin working for Good Shepherd. Do you have any facts that support that statement?" to which Mr. Vasic answered "Yeah, I'm--yeah, I'm not sure about that statement. I don't have any facts to support that statement." Based on Plaintiff's uncorrected deposition testimony that the allegations had no factual support the Court declines to

infer or conclude Defendant Huber solicited Plaintiff's employees as alleged in the complaint. Even if she had done so that would not have been in violation of any enforceable agreement or principal of law.

In the Plaintiff's deposition Mr. Vasic was asked if the basis for the claims against the Defendants was that they were covered by HIPAA, Plaintiff's deposition at 104:22-105:1. Mr. Vasic answered affirmatively. All reported cases on the issue indicate that there is no private right of action under HIPAA regardless of how the claim is alleged. *Bradley v. Pfizer, Inc.*, 440 Fed. Appx. 805, 809 (11th Cir. 2011) (invasion of privacy claim not supported by alleged HIPAA violation); *Seaton v. Mayberg*, 610 F.3d 530, 533 (9th Cir. 2010) (due process violation claim not supported by alleged HIPAA violation); *Huling v. City of Los Banos*, 2012 U.S. Dist. LEXIS 8765 (E.D. Cal. Jan. 24, 2012) (invasion of privacy, defamation, intentional infliction of emotional distress, interference with advantageous relationships, and negligence not supported by alleged HIPAA violation). Accordingly, to the extent Plaintiff's claims pertain to legal theories for which the underlying grounds are violations of HIPAA, they fail as a matter of law.

Plaintiff seeks to restrict the individual Defendants' ability to be employed and/or to interact with others. Restrictive covenants are not favored in the law but are allowed if they are narrowly tailored to accomplish legitimate ends. Restricting competition is not a legitimate end. The restrictions Plaintiff seeks to enforce on the individual Defendants have no geographic or temporal bounds and are therefore grossly over broad. Because covenants which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable, neither the "contracts" nor claims based on them may not be enforced against these Defendants. *digEcor, Inc. v.*

e.Digital Corp., 2009 U.S. Dist. LEXIS 28199, 4-5 (D. Utah Apr. 2, 2009); *Scenic Aviation, Inc. v. Blick*, 2003 U.S. Dist. LEXIS 28009 (D. Utah Aug. 4, 2003) .

Plaintiff has not offered admissible evidence in response to Defendants' motion for summary judgment but has instead relied upon speculation, conjecture, inadmissible hearsay and statements without foundation. See Plaintiff's facts numbered 7, 13, 14, 15, 16, 17, 18, and Plaintiff's exhibits G, H, I, J, L, M, N, and O. Plaintiff further attempts to recast the answers given by Mr. Vasic in the deposition to infer that he testified that he had no direct evidence or first hand knowledge of the information sought in the deposition. Mr. Vasic in fact did not use the terms direct evidence or first hand knowledge in responding to most of the questions at issue though he was required by Rule 30(b)(6) to become familiar with the Plaintiff's case and facts prior to being deposed. The Court rejects Plaintiff's attempt to restate its deposition answers.

Once a motion for summary judgment is filed with proper support it becomes the opposing party's duty to respond with evidence, which would be admissible at trial, on each element of the challenged causes of action. The Court concludes that while the Plaintiff may have produced evidence on some of the elements of its claims it did not produce evidence establishing all of the elements of any of its claims and has accordingly not met its burden on summary judgment.

NOW THEREFORE IT IS HEREBY ORDERED that the motion for summary judgment filed by Defendants Huber and Molyneux is granted and Plaintiff's claims against them are dismissed with prejudice and on the merits.

END OF ORDER

Delivery Certificate

I hereby certify that a true and correct copy of the foregoing **Order** to be served by the method(s) indicated below and addressed to the following on February 28, 2014.

Gary Guelker
Janet Jenson
747 East South Temple #130
Salt Lake City, Utah 84102

David N. Kelly
FABIAN & CLENDENIN
215 South State St. #1200
Salt Lake City, Utah 84111

Merrill Nielson (U.S. Mail)
562 West 1300 North
West Bountiful, Utah 84087

(x) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile
( ) E-mail
(x) Electronic Filing

/s/ Robert H Wilde

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE CITY DEPARTMENT

HEARTWOOD HOME HEALTH & HOSPICE, LLC, a Utah limited liability company, Plaintiff, v. MERRILL B. NIELSON, an individual, RITA HUBER, an individual, GLENNA MOLYNEUX, an individual, and GOOD SHEPHERD HOME CARE & HOSPICE, INC., a Utah corporation, Defendants.	**ORDER** Case No. 120907379 Judge John Paul Kennedy

THIS MATTER is before the Court on Defendants Glenna Molyneux and Rita Huber's (these Defendants) motion for sanctions. The parties briefed the issues and the Court heard argument on April 21, 2014. The Court then allowed supplemental briefing and the matter was submitted on April 23, 2014. Having carefully reviewed the record and considering the arguments of counsel, the Court now issues the following Order.

By way of background, Plaintiff Heartwood Home Health & Hospice, LLC (Heartwood) initiated the instant action in November 2012, alleging various causes of action against these Defendants relating to their conduct around the time they ended their employment with Heartwood. Heartwood's Complaint contains the following factual allegations:

> 31. The individual defendants breached their confidentiality and non-disclosure agreements with Heartwood by copying, removing and using Heartwood's proprietary information and by contacting Heartwood's patients and current employees in [an improper manner].
>
> ...
>
> 34. The individual defendants violated their duties of loyalty owed to Heartwood in that, while still employed by Heartwood, defendants competed against Heartwood, defamed and disparaged Heartwood's business and employees, misappropriated confidential and proprietary information, improperly disclosed such information to third parties, including Good Shepherd, and solicited Heartwood's employees and customer contacts for Good Shepherd's business.
>
> ...
>
> 38. On information and belief, the individual defendants breached their duty of confidentiality by disclosing Heartwood's confidential information to third parties, including Good Shepherd, and by using and disclosing such confidential information for their own benefit, including to compete unfairly against Heartwood.
>
> ...
>
> 42. Heartwood has been harmed by the defendants Huber, Nielson and Molyneaux who have, for their own benefit, and for the benefit of Good Shepherd, intentionally and willfully interfered with the contracts that Heartwood has with its patients. Defendants Huber, Nielson and Molyneaux have knowingly and intentionally misinformed Heartwood's patients concerning the terms of their contracts to induce them to terminate their contracts with Heartwood. They have interfered with and induced Heartwood's patients to terminate their agreements with Heartwood on behalf of and for the benefit of Good Shepherd.

(Complaint ¶¶ 31, 34, 38, 42.)

After conducting discovery, including the deposition of Heartwood's owner, Lee Vasic, it became clear to these Defendants that Heartwood did not have any evidence to support its claims against them. Accordingly, these Defendants served Heartwood with their Rule 11 motion under the safe-harbor provision of that rule. Heartwood declined to withdraw its claims, so these

Defendants moved for summary judgment. Heartwood contested the motion for summary judgment but, at oral argument, informed the Court and opposing counsel that its claims against these Defendants had been narrowed. Heartwood explained that it was only pursuing claims against Huber for soliciting Heartwood's employees and against Molyneux for soliciting Heartwood's patients. The Court ultimately ruled in favor of these Defendants on summary judgment and dismissed all claims against them. These Defendants then filed their motion for sanctions with the Court.

Rule 11 of the Utah Rules of Civil Procedure requires that a party's "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]" Utah R. Civ. P. 11(b)(3). If an attorney or party violates Rule 11(b)(3), then the court may "impose an appropriate sanction." Utah R. Civ. P. 11(c). "The law requires that a trial court make a series of specific factual findings as a predicate for concluding that the rule has been violated, and then must determine the appropriate sanction." *Griffith v. Griffith*, 1999 UT 78, ¶ 10, 985 P.2d 255.

> Rule 11 does not call for the imposition of sanctions whenever there are factual errors; the misstatements must be significant and sanctions will not be imposed when they are not critical and the surrounding circumstances indicate that counsel did conduct a reasonable inquiry.... [T]he fact that a complaint is dismissed for legal insufficiency or does not produce a triable issue does not necessarily mean that a sanction is appropriate.

Morse v. Packer, 2000 UT 86, ¶ 28, 15 P.3d 1021 (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1335, at 67, 88 (1990)).

These Defendants contend that Heartwood's allegations against them lacked evidentiary support. They argue that the lack of evidentiary support should have been obvious after Mr. Vasic's deposition and that, by failing to withdraw its claims, Heartwood violated Rule 11. The Court agrees and makes the following specific factual findings in support of its conclusion:

1. Heartwood made allegations against these Defendants in its Complaint for, among other things, improper conduct in soliciting Heartwood's employees and patients.

2. Heartwood reaffirmed and later advocated based on these allegations in opposing these Defendants' motion for summary judgment.

3. Heartwood lacked evidentiary support and legal basis for its allegations against these Defendants.

4. Although Heartwood may have had reason to believe at the time it filed its Complaint that the allegations against these Defendants would materialize, Heartwood was unable, after conducting discovery, to produce any evidence in support of the allegations.

5. Mr. Vasic made clear in his deposition that Heartwood had no evidence to support its claims against these Defendants.

6. At the end of discovery, it should have been clear to Heartwood that it was unable to support its claims against these Defendants with evidence.

7. It was unreasonable for Heartwood to continue prosecuting its claims against these Defendants after it became clear that the claims lacked evidentiary support or legal basis.

8. Heartwood relied on speculation and assumptions in continuing to prosecute its claims against these Defendants and in opposing these Defendants' motion for summary judgment.

9. By refusing to withdraw its claims against these Defendants after Mr. Vasic's deposition, Heartwood acted in bad faith.

Based on the foregoing factual findings, the Court concludes that Heartwood violated Rule 11 by failing to withdraw its claims against these Defendants after being served under the

safe harbor provision and by continuing to advocate for a position that clearly lacked evidentiary support. In so concluding, the Court rejects Heartwood's argument that the only relevant inquiry under a Rule 11 analysis is on the reasonableness of counsel's investigation at the beginning of the case. As the Utah Supreme Court stated, "a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit." *Morse*, 2000 UT 86, ¶ 31 (quoting Fed. R. Civ. P. 11 advisory committee note).

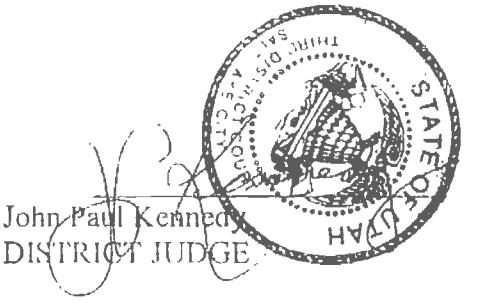
Having concluded that Heartwood violated Rule 11, the Court next determines the appropriate sanction. The Court has discretion to fashion an appropriate sanction based on the facts this case. *See Bailey-Allen Co., Inc. v. Kurzet*, 945 P.2d 180, 195 (noting that the trial court is given "great leeway to tailor the sanction to fit the requirements of the particular case"). Because Heartwood's conduct caused these Defendants to incur extra fees in continuing to defend against baseless claims, the Court determines that these Defendants are entitled to compensation for their reasonable attorney fees incurred litigating their motion for summary judgment and motion for sanctions.

Based on the foregoing, these Defendants' motion for sanctions is GRANTED. Heartwood shall pay these Defendants for their reasonable attorney fees in defending the claims after it became clear that the claims lacked evidentiary support and legal basis. These Defendants shall submit an attorney fee affidavit within 10 days and Heartwood may file an objection as

permitted by the rules. The Court will then determine the amount of sanction. No additional order is necessary.

DATED this 20 day of June, 2014.

BY THE COURT:



John Paul Kennedy
DISTRICT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 120907379 by the method and on the date specified.

MAIL: MERRILL B NIELSON 562 WEST 1300 NORTH WEST BOUNTIFUL, UT 84087
MAIL: GARY R GUELKER 747 E S TEMPLE ST STE 130 SALT LAKE CITY UT 84102
MAIL: JANET I JENSON 747 E S TEMPLE STE 130 SALT LAKE CITY UT 84102
MAIL: DAVID N KELLEY 215 S STATE ST STE 1200 SALT LAKE CITY UT 84111-2323
MAIL: MICHAEL S WILDE 257 E 200 S STE 800 SALT LAKE CITY UT 84111

Date: 06/20/2014

/s/ MICHELLE BANEY

Deputy Court Clerk

Employee Handbook

Welcome

Welcome to Heartwood Home Health & Hospice!

Dear Employee:

You and Heartwood Home Health & Hospice have made an important decision: The Company has decided you can contribute to our success, and you've decided that Heartwood Home Health & Hospice is the organization where you can pursue your career productively and enjoyably.

We believe we've each made the right decision, one that will result in a profitable relationship. The minute you start working here, you become an integral part of Heartwood Home Health & Hospice and its future. Every job in our company is important, and you will play a key role in the continued growth of our company.

As you will quickly discover, our success is based on delivering high quality service and providing unsurpassed patient care. How do we do it? By working very hard, thinking about our patients' needs, and doing whatever it takes. We do it by treating each other and customers with respect. We do it by acting as a team.

Should you have any questions concerning this handbook, your employment or benefits, please feel free to discuss them with your supervisor or manager.

Again, welcome!

Introduction & Description of Company

Heartwood Home Health & Hospice is dedicated to providing the best care possible to our patients and their families.

Confidentiality Agreement

In order for HEARTWOOD HOME HEALTH & HOSPICE to be successful in providing top quality care to people, we must have the confidence and trust of the people that we work with. Confidentiality is essential if we are to be worthy of this trust. Employment may involve access to data that is confidential according to both Federal and State Law.

Under Section 1166 of Title I of the Social Security Act, any data or information acquired by this agency in the exercise of its function must be held in confidence and may not be disclosed to any person except (a) to the extent that it may be necessary to carry out the agency's responsibility, or (b) in such cases and under such circumstances as the Secretary of the Department of Health Educational and Welfare may, by regulation, provide to assure adequate protection of the rights and interests of patients, health care practitioners, and providers of health care services. Violations of disclosure prohibitions are subject to penalty, upon conviction, of a fine more than $1,000 and imprisonment for six (6) months or both.

Each employee of HEARTWOOD HOME HEALTH & HOSPICE shall not disclose any information regarding current or former employees to patients or outside the organization except as authorized by our policies. Your employment contract is between you and your supervisor, and aspects of your schedule or pay should not be shared with others. No staff shall disclose any inappropriate personal situations. Any use of Heartwood marketing materials, advertisements, and policies may not be used in future business ventures or employment. Confidential information shall not be disclosed to any employee, consultant, patient, family, or other third party unless specifically authorized by the director.

Knowledge of employees and patients is specifically the privilege of your employment here. If your employment should end with HEARTWOOD HOME HEALTH & HOSPICE, you are prohibited to contact any employee, patient, or other professional relationship you have that was a result of being an employee of HEARTWOOD HOME HEALTH & HOSPICE. Caring for current or past Heartwood Home Health and Hospice patients on a private duty basis outside of your employment with HEARTWOOD HOME HEALTH & HOSPICE is strictly prohibited and will be grounds for immediate termination.

Conflict of Interest

Employees must avoid any interest, influence or relationship which might conflict or appear to conflict with the best interests of Heartwood Home Health & Hospice. You must avoid any

situation in which your loyalty may be divided and promptly disclose any situation where an actual or potential conflict may exist.

Examples of potential conflict situations include:

1 Having a financial interest in any business transaction with Heartwood Home Health & Hospice
2 Owning or having a significant financial interest in, or other relationship with, a Heartwood Home Health & Hospice competitor, customer or supplier, and
3 Accepting gifts, entertainment or other benefit of more than a nominal value from a Heartwood Home Health & Hospice competitor, customer or supplier.
4 Working privately for any of Heartwood's past or current patients.

Anyone with a conflict of interest must disclose it to management and remove themselves from negotiations, deliberations or votes involving the conflict. You may, however, state your position and answer questions when your knowledge may be of assistance to Heartwood Home Health & Hospice.

Anti Discrimination & Harassment

Americans with Disabilities Act

It is Heartwood Home Health & Hospice's policy that we will not discriminate against qualified individuals with disabilities with regard to any aspect of their employment. Heartwood Home Health & Hospice is committed to complying with the American with Disabilities Act of 1990 and its related Section 504 of the Rehabilitation Act of 1973. Heartwood Home Health & Hospice recognizes that some individuals with disabilities may require accommodations at work. If you are currently disabled or become disabled during your employment, you should contact your manager to discuss reasonable accommodations that may enable you to perform the essential functions of your job. Documentation of your disability must be given in writing to your direct supervisor and Human Resources so that arrangements can be made to your work processes to effectively accommodate your disability.

Equal Opportunity Policy

Heartwood Home Health & Hospice provides equal opportunity in all of our employment practices to all qualified employees and applicants without regard to race, color, religion, gender, national origin, age, disability, marital status, military status or any other category protected by federal, state and local laws. This policy applies to all aspects of the employment relationship, including recruitment, hiring, compensation, promotion, transfer, disciplinary action, layoff, return from layoff, training and social, and recreational programs. All such employment decisions will be made without unlawfully discriminating on any prohibited basis.

Policy Prohibiting Harassment and Discrimination

Heartwood Home Health & Hospice strives to maintain an environment free from discrimination and harassment, where employees treat each other with respect, dignity and courtesy.

This policy applies to all phases of employment, including but not limited to recruiting, testing, hiring, promoting, demoting, transferring, laying off, terminating, paying, granting benefits and training.

Prohibited Behavior
Heartwood Home Health & Hospice does not and will not tolerate any type of harassment of our employees, applicants for employment, or our customers. Discriminatory conduct or conduct characterized as harassment as defined below is prohibited.

The term harassment includes, but is not limited to, slurs, jokes, and other verbal or physical conduct relating to a person's gender, ethnicity, race, color, creed, religion, sexual orientation, national origin, age, disability, marital status, military status or any other protected classification that unreasonably interferes with a person's work performance or creates an intimidating, hostile work environment.

Sexually harassing behavior in particular includes unwelcome conduct such as: sexual advances, requests for sexual favors, offensive touching, or other verbal or physical conduct of a sexual nature. Such conduct may constitute sexual harassment when it:

1 is made an explicit or implicit condition of employment
2 is used as the basis for employment decisions
3 unreasonably interferes with an individual's work performance, or
4 creates an intimidating, hostile or offensive working environment.

The types of conduct covered by this policy include: demands or subtle pressure for sexual favors accompanied by a promise of favorable job treatment or a threat concerning employment.

Specifically, it includes sexual behavior such as:
1 repeated sexual flirtations, advances or propositions
2 continued and repeated verbal abuse of a sexual nature,
3 sexually related comments and joking, graphic or
4 degrading comments about an employee's appearance
5 or displaying sexually suggestive objects or pictures
6 including cartoons and vulgar email messages, and
7 any uninvited physical contact or touching, such as patting, pinching or repeated brushing against another's body.

Such conduct may constitute sexual harassment regardless of whether the conduct is between members of management, between management and staff employees, between staff employees, or directed at employees by nonemployees conducting business with the Company, regardless of gender or sexual orientation.

Harassment by Nonemployees
Heartwood Home Health & Hospice will also protect its employees from reported harassment by nonemployees in the workplace, including customers, patients and suppliers.

Complaint Procedure and Investigation
Any employee who wishes to report a possible incident of sexual harassment or other unlawful harassment or discrimination should promptly report the matter to Lee Vasic. If that person is not available, or you believe it would be inappropriate to contact that person, contact Jessica Rockne or Lee Vasic.

Heartwood Home Health & Hospice will conduct a prompt investigation as confidentially as possible under the circumstances. Employees who raise concerns and make reports in good faith can do so without fear of reprisal; at the same time employees have an obligation to cooperate Heartwood Home Health & Hospice in enforcing this policy and investigating and remedying complaints.

Any employee who becomes aware of possible sexual harassment or other illegal discrimination against others should promptly advise Lee Vasic or any other appropriate member of management.

Anyone found to have engaged in such wrongful behavior will be subject to appropriate discipline, which may include termination.

Retaliation
Any employee who files a complaint of sexual harassment or other discrimination in good faith will not be adversely affected in terms and conditions of employment and will not be retaliated against or discharged because of the complaint.

In addition, we will not tolerate retaliation against any employee who, in good faith, cooperates in the investigation of a complaint. Anyone who engages in such retaliatory behavior will be subject to appropriate discipline, up to and including termination.

Employment at Will

Unless expressly proscribed by statute or contract, your employment is "at will." All Heartwood Home Health & Hospice employees are at will, which means they may be terminated at any time and for any reason, with or without advance notice. Employees are also free to quit at any time. Any employment relationship other than at will must be set out in writing and signed by Heartwood Home Health & Hospice's Administrator, Lee Vasic.

Compensation & Work Schedule

Attendance & Punctuality

Every employee is expected to attend work regularly and report to work on time. Hours of operation are Monday through Friday 9am-5pm.

If you are unable to report to work on time for any reason, telephone the office at 801-261-9490

and the report line at 801-639-5030 as far in advance as possible. If you do not call in an absence in advance, it will be considered unexcused.

Unsatisfactory attendance, including reporting late, quitting early, rescheduling too many patients, etc. may be cause for disciplinary action, up to and including discharge.

If you require an alternate work schedule to accommodate family and school obligations, please coordinate these in writing with your supervisor. Examples would be arriving after 9am or leaving before 5pm or any regularly scheduled appointment you may have.

General Pay Information

Certain deductions will be made in accordance with federal and state laws.

In addition, the Company makes available certain voluntary deductions as part of the Company's benefits program. If an employee elects supplemental coverage under one of the Company's benefits plans, which requires employee contributions, the employee's share of the cost will be deducted from his or her check each pay period. If the employee is not receiving a payroll check due to illness, injury, or leave of absence, he or she will be required to pay the monthly cost directly to the Company.

Outside Employment

Because of Heartwood Home Health & Hospice's obligations to its customers, the Company must be aware of any concurrent employment you may have to determine whether or not it presents a potential conflict.

Serving on any public or government board or commission qualifies as employment for purposes of this policy, regardless of whether such service is compensated.

Before beginning or continuing outside employment, employees are required to complete a questionnaire detailing the involvement with the other employer and to obtain the written approval of their managers and Staffing. Failing to obtain prior approval as described may be cause for disciplinary action, up to and including termination. Employees who are on leave of absence, including FMLA leave or Workers' Compensation leave are prohibited from having outside employment during their leave.

Pay Schedule

Employees will be paid on Friday, every two weeks. If the regular payday falls on a holiday, payday will be the last regular workday before the holiday.

The pay week starts at the beginning of your shift on Sunday and includes all work you perform up to the close of business on Friday.

If a paycheck is lost or stolen, notify Jessica Rockne immediately.

Performance Evaluations

Supervisors and employees are strongly encouraged to discuss job performance and goals informally any time.

Additional formal performance reviews will be conducted to provide both supervisors and employees with the opportunity to discuss job tasks, identify and correct weaknesses, encourage and recognize strengths, and discuss positive, purposeful approaches for meeting goals. These formal reviews will be conducted annually.

Time Records

All employees must keep accurate time/visit records by completing timesheets when entering or leaving the office or a patient's home. Tampering with, falsifying or altering time records or completing another employee's time card will result in disciplinary action, up to and including discharge. Failing to record work time may also result in disciplinary action.

For payroll purposes, time is rounded to the nearest quarter of an hour. If timesheets or visit notes are not turned in daily, the employee will not be paid timely.

Work Hours

Heartwood Home Health & Hospice follows a work schedule of 40 hours per week. The normal workweek and standard office hours are Monday through Friday from 9am to 5pm. Your supervisor or manager may establish alternative hours or visits.

Overtime Hours

Overtime should only be used in instances when deemed necessary by management. Heartwood will pay employees overtime based on Utah and Federal government guidelines. However, every effort should be made to not work overtime.

Compensation Time

Compensation time, meaning time worked but not paid for until a later date is not acceptable except within the week that it is worked. For example, if you work 10 hours on Monday, you may take the extra two hours off during the current workweek, but you cannot save the two hours to be paid as time off at another date.

Conduct Standards

Company Equipment and Vehicles

When using Heartwood Home Health & Hospice property, including computer equipment or hardware, exercise care, perform required maintenance and follow all operating instructions, safety standards and guidelines.

Notify your supervisor if any equipment or machines appear to be damaged, defective or in need of repair. This prompt reporting could prevent the equipment's deterioration and could also help prevent injury to you or others. Should you have questions about the maintenance and care of any workplace equipment, ask your supervisor.

If you use or operate equipment improperly, carelessly, negligently or unsafely, you may be disciplined or even discharged. In addition, you may be held financially responsible for any loss to Heartwood Home Health & Hospice because of such mistreatment.

Company Property

Please keep your work area neat and clean and use normal care in handling company property. Report any broken or damaged equipment to your manager at once so that proper repairs can be made.

You may not use any company property for personal purposes or remove any company property from the premises without prior written permission from Lee Vasic.

Conduct Standards & Discipline

Heartwood Home Health & Hospice expects every employee to adhere to the highest standards of job performance and of personal conduct, including individual involvement with company personnel and outside business contacts.

The Company reserves the right to discipline or discharge any employee for violating any company policy, practice or rule of conduct. The following list is intended to give you notice of our expectations and standards. However, it does not include every type of unacceptable behavior that can or will result in disciplinary action. Be aware that Heartwood Home Health & Hospice retains the discretion to determine the nature and extent of any discipline based upon the circumstances of each individual case.

Employees may be disciplined or terminated for poor job performance, including, but not limited to the following:

- unsatisfactory quality or quantity of work
- repeated unexcused absences or lateness
- failing to follow instructions or Company procedures, or
- failing to follow established safety regulations.
- Putting patient's care in jeopardy
- violating HIPAA
- falsifying timesheet information
- discussing your personal information with other staff members

Employees may also be disciplined or terminated for misconduct, including, but not limited to the following:

- falsifying an employment application or any other company records or documents

- failing to record working time accurately or recording a co-worker's timesheet
- insubordination or other refusal to perform
- using vulgar, profane or obscene language, including any communication or action that violates our policy against harassment and other unlawful forms of discrimination
- disorderly conduct, fighting or other acts of violence
- misusing, destroying or stealing company property or another person's property
- possessing, entering with or using weapons on company property
- possessing, selling, using or reporting to work with alcohol, controlled substances or illegal drugs present in the employee's system, on company property or on company time
- violating conflict of interest rules
- disclosing or using confidential or proprietary information without authorization
- violating the Company's computer or software use policies, and
- being convicted of a crime that indicates unfitness for a job or presents a threat to the Company or its employees in any way.

Dress Policy

Appropriate office attire is required. Suppliers and customers visit our office and we wish to put forth an image that will make us all proud to be Heartwood Home Health & Hospice employees. Be guided by common sense and good taste.

Office staff is required to wear 'business casual' every day. Field staff is required to wear white scrubs and maintain cleanliness of self and uniforms.

Drug and Alcohol Policy

Heartwood Home Health & Hospice strives to maintain a workplace free of drugs and alcohol and to discourage drug and alcohol abuse by its employees. Misuse of alcohol or drugs by employees can impair the ability of employees to perform their duties, as well as adversely affect our customers' and customers' confidence in our company.

Alcohol

Employees are prohibited from using or being under the influence of alcohol while performing company business for Heartwood Home Health & Hospice, while operating a motor vehicle in the course of business or for any job-related purpose, or while on company premises or a worksite.

Illegal Drugs

Heartwood Home Health & Hospice employees are prohibited from using or being under the influence of illegal drugs while performing company business or while on a company facility or worksite. You may not use, manufacture, distribute, purchase, transfer or possess an illegal drug while in Heartwood Home Health & Hospice facilities, while operating a motor vehicle for any job-related purpose or while on the job, or while performing company business. This policy does not prohibit the proper use of medication under the direction of a physician; however, misuse of such medications is prohibited.

Disciplinary Action

Employees who violate this policy may be disciplined or terminated, even for a first offense. Violations include refusal to consent to and comply with testing and search procedures as

Heartwood Home Health & Hospice may conduct searches for illegal drugs or alcohol on company facilities or worksites without prior notice to employees. Such searches may be conducted at any time. Employees are expected to cooperate fully.

Searches of employees and their personal property may be conducted when there is reasonable cause to believe that the employee has violated this policy or when circumstances or workplace conditions justify such a search. Personal property may include, but is not limited to, purses, briefcases, as well as any Heartwood Home Health & Hospice property that is provided for employees' personal use, such as desks, lockers, and files.

An employee's consent to a search is required as a condition of employment and the employee's refusal to consent may result in disciplinary action, including termination.

Drug Testing

Heartwood Home Health & Hospice may require a blood test, urinalysis, hair test or other drug screening of employees suspected of using or being under the influence of drugs or alcohol, where other circumstances or workplace conditions justify such testing. The refusal to submit to testing may result in disciplinary action, including termination.

Ethical and Legal Business Practices

Heartwood Home Health & Hospice expects the highest standard of ethical conduct and fair dealing from each employee, officer, director, volunteer and all others associated with the organization. Our reputation is a valuable asset, and we must continually earn the trust, confidence and respect of our suppliers, our members, our customers and our community.

This policy provides general guidance on the ethical principles that we all must follow, but no policy can anticipate all situations. You should also be guided by basic honesty and good judgment, and be sensitive to others' perceptions and interpretations.

If you have any questions about this policy, consult your supervisor or manager. Exceptions to this policy may be made only by Lee Vasic.

You are expected to promptly disclose to the management of the company anything that may violate this policy. We will not tolerate retaliation or retribution against anyone who brings violations to management's attention.

Complying With Laws and Regulations

Business activities are to be conducted in compliance with the letter and spirit of all laws and regulations. You are charged with the responsibility of understanding the applicable laws,

recognizing potential dangers and knowing when to seek legal advice.

Giving and Receiving Gifts
You may not give or receive money or any gift to or from a patient, family member or other organization or person. Exceptions may be made for gifts that are customary and lawful, are of nominal value and are authorized in advance.

You may accept meals and refreshments if they are infrequent, are of nominal value and are in connection with business discussions.

If you do receive a gift or other benefit of more than nominal value, report it promptly to a member of management. It will be returned or donated to a suitable charity.

Employee Privacy and Other Confidential Information
Heartwood Home Health & Hospice collects only personal information about employees that relates to their employment. Only people with a business-related need to know are given access to this information, and Lee Vasic must authorize any release of the information to others. Personal information, other than that required to verify employment or to satisfy legitimate investigatory or legal requirements, will be released outside the company only with employee approval.

If you have access to any confidential information, including private employee information, you are responsible for acting with integrity. Unauthorized disclosure or inappropriate use of confidential information will not be tolerated.

Accounting and Financial Reports
Heartwood Home Health & Hospice's financial statements and all books and records on which they are based must accurately reflect the Company's transactions. All disbursements and receipts must be properly authorized and recorded.

You must record and report financial information accurately. Reimbursable business expenses must be reasonable, accurately reported and supported by receipts.

Those responsible for handling or disbursing funds must assure that all transactions are executed as authorized and recorded to permit financial statements in accord with Generally Accepted Accounting Principles.

Account and Patient Information
Employees are prohibited from distributing account, client, and/or customer information to anyone, in any form, except the named account holder, client or customer.

Compliance
Employees who fail to comply with this policy will be disciplined, which may include a demand for reimbursement of any losses or damages, termination of employment and referral for criminal prosecution. Action appropriate to the circumstances will also be taken against supervisors or

others who fail to report a violation or withhold relevant information concerning a violation of this policy.

Grievances

Employees are encouraged to bring concerns, problems and grievances to management's attention. You are also obligated to report any wrongdoing of which you become aware to your manager or, if the situation warrants, to any Heartwood Home Health & Hospice officer.

Progressive Discipline

Heartwood Home Health & Hospice retains the discretion to discipline its employees. Oral and written warnings and progressive discipline up to and including discharge may be administered as appropriate under the circumstances.

Please note that Heartwood Home Health & Hospice reserves the right to terminate any employee whose conduct merits immediate dismissal without resorting to any aspect of the progressive discipline process.

Zero Tolerance for Workplace Violence

Heartwood Home Health & Hospice has a zero-tolerance policy concerning threats, intimidation and violence of any kind in the workplace either committed by or directed to our employees. Employees who engage in such conduct will be disciplined, up to and including immediate termination of employment.

Employees are not permitted to bring weapons of any kind onto company premises or to company functions. Any employee who is suspected of possessing a weapon will be subject to a search at the company's discretion. Such searches may include, but not be limited to, the employee's personal effects, desk and workspace.

If an employee feels he or she has been subjected to threats or threatening conduct by a coworker, patient or customer, the employee should notify his or her supervisor or another member of management immediately. Employees will not be penalized for reporting such concerns.

Leave

Family Medical Leave (FMLA)

General

Family and Medical Leave
You are eligible for family and medical leave if you have worked for Heartwood Home Health & Hospice for at least 12 months and have put in at least 1,250 hours during the 12 month period before the leave is to begin.

Reasons for the Leave
You are entitled to take up to 12 workweeks of unpaid leave:

- to attend to the birth, adoption or foster care placement of your child
- to attend to the serious health condition of your child, spouse or parent, or
- to receive care for your own serious health condition.

A serious health condition means an illness, injury, impairment, or physical or mental condition during which you are incapable of working that involves either:

- treatment requiring inpatient care in a hospital, hospice or residential care facility, or
- continuing treatment by a health care provider for a condition that lasts more than three consecutive days, or for pregnancy or prenatal care or for a chronic health condition which continues over an extended period of time, requires periodic visits to a health care provider and may involve occasional episodes of incapacity, such as serious asthma or diabetes.

It also includes a permanent or long-term condition such as Alzheimer's, a severe stroke and terminal cancer. In addition, leave may be used to cover absences due to multiple treatments for restorative surgery or for a condition which would likely make you incapable of working for more than three days if not treated, such as chemotherapy or radiation treatments for cancer.

Substituting Paid Leave
You must substitute accrued vacation or personal leave time for family and medical leave. And if the request for leave is due to your own serious health condition, you must first exhaust all accrued PTO. Your total FMLA leave time, which may include paid vacation and sick time, may not exceed 12 weeks. The Company has the right to designate such leaves as running concurrently with FMLA leave.

Types of Leave
Leave due to the birth or placement of a child in your home for adoption or foster care must be taken in one continuous 12-week segment and must be taken within 12 months of the birth or placement of the child. You may take leave due to your own or a family member's serious health condition in:

- one continuous 12 week segment
- an intermittent schedule, such as one day off each week, or
- a reduced schedule, such as beginning two hours late, twice a week.

Notice of Leave
If your need for leave is foreseeable, you must give 30 days prior notice if possible. If you do not give such notice, the leave may be delayed for up to 30 days.

If your need for leave is due to a planned medical treatment, make every attempt to schedule the treatment so as not to unduly disrupt the work of your department. If your need for leave is not foreseeable, you must request it as soon as practicable, no later than two business days after the

need for leave arises.

Medical Certification
If leave is requested due to your own or a family member's serious health condition, you must provide medical certification from an appropriate health care provider. The medical certification must include the date on which the condition began and its probable duration. You may be denied leave if you do not provide satisfactory certification. Heartwood Home Health & Hospice may also require a second opinion or third opinion regarding certification of a serious health condition, at our expense.

Outside Employment
You may not work for outside employers while on family and medical leave with Heartwood Home Health & Hospice.

Returning to Work
If your leave is due to your own medical condition, you are required to provide medical certification that you are able to resume work before returning. Both you and your health care provider must complete a Return to Work Medical Certification.

Upon returning to work, you will ordinarily be entitled to be restored to your former position or to an equivalent position with the same employment benefits and pay if possible. If you do not return to work at the end of the leave and do not notify Heartwood Home Health & Hospice of your status, you may be terminated. This must be done for any illness resulting in a loss of two or more consecutive days.

Benefits During Leave
Taking family and medical leave will not cause you to lose any employment benefits accrued prior to the first day of leave. The leave period will be treated as continued service for purposes of determining vesting and eligibility to participate in any retirement plan in effect. However, employees on FMLA leave normally will not accrue any other additional benefits during the leave period, unless it is paid leave under which benefits would otherwise accrue.

Misrepresenting Reasons for Leave
If you intentionally misrepresent the reasons for requesting family and medical leave, you may be discharged.

General Employment

Employee Classifications

Employees at Heartwood Home Health & Hospice are either full-time or part-time. The Company may on occasion hire temporary or seasonal employees, who will not generally be eligible for benefits.

Part-time employees work fewer than 35 hours/visits per week, but more than 15 hours/visits per

week. Unless specifically stated, employees working less than 15 hours are not afforded any benefits other than wages; for example, they do not accrue benefits such as sick days, vacation days, and health insurance.

All other employees are full-time.

Your supervisor will verify whether you are a full-time or part-time employee, and also whether you are exempt or non-exempt. Exempt employees are not entitled to overtime under the Fair Labor Standards Act, while non-exempt employees can qualify for this pay.

Employee Records

General

An employee's personnel file consists of the employee's employment application, withholding forms, reference checks, emergency information and any performance appraisals, benefits data or other appropriate employment-related documents.

It is the employee's responsibility to notify the Payroll Department or Human Resources of any changes in name, address, telephone number, marital status, number of dependents, military service status, beneficiaries or person to notify in case of an accident.

Misrepresentation of any fact which you have provided information for on your application, in your personnel file, or any other document is sufficient reason for dismissal. Personnel records are considered company property and are not available for review by employees.

Utah

An original personnel file consists of an employee's employment application, withholding forms, reference checks, emergency information and any performance appraisals, benefits data and other appropriate employment-related documents.

It is your responsibility to notify the Payroll or Human Resources department of any changes in name, address, telephone number, marital status, number of dependents, military service status, beneficiaries or person to notify in case of an accident.

You may be dismissed for misrepresenting any fact on your application or in your personnel file.

Personnel records are considered company property. You may review and make copies of your record in the Staffing offices after giving adequate notice.

Introductory (Training) Period

The first 90 days of employment are an Introductory Period for both the employee and the Company. However, during and after this period, the work relationship will remain at will.

This time period allows you to determine if you have made the right career decision and for Heartwood Home Health & Hospice to determine whether your initial work performance meets

our needs. Your manager will monitor your work performance, attitude and attendance during this time, and be available to answer any questions or concerns you may have about your new job.

The Introductory Period may be extended at management's discretion.

Reference/Background Checks

Heartwood Home Health & Hospice conducts reference and background checks on all new employees. Employees who have falsified information on their employment applications will be disciplined, which could include termination. Applicants who have provided false information may be eliminated from further consideration for employment.

Termination, Resignation and Discharge

General

Unless expressly proscribed by statute or contract, employment with Heartwood Home Health & Hospice is on an "at will" basis and may be terminated with or without cause or notice. Similarly, employees are free to resign their employment at any time. If at any time it is necessary for an employee to resign his or her employment with the Company, Heartwood Home Health & Hospice requests at least two weeks' notice. Failure to provide notice may lead to forfeiture of accrued vacation or other benefits at the discretion of Heartwood Home Health & Hospice.

Any employee who is discharged by Heartwood Home Health & Hospice shall be paid only wages accrued to the effective date of the separation.

Safety & Emergency

Safety

Heartwood Home Health & Hospice is committed to maintaining a safe and healthy environment for all employees. Report all accidents, injuries, potential safety hazards, safety suggestions and health and safety related issues immediately to your manager.

If you or another employee is injured, contact your supervisor or manager immediately. Seek help from outside emergency response agencies, if needed. Contact information is posted in the Office Kitchen.

You must complete an Employee's Claim for Worker's Compensation Benefits Form if you have an injury that requires medical attention. If your inquiry does not require medical attention, you must still complete a Supervisor and Employee Report of Accident Form in case medical treatment is later needed and to ensure that any existing safety hazards are corrected. You can obtain the required forms from Staffing.

A federal law, the Occupational Safety and Health Act, requires that we keep records of all

illnesses and accidents that occur on the job. OSHA also provides for your right to know about any health hazards which might be present on the job.

In addition, the state Workers' Compensation Act also requires that you report any illness or injury caused by the workplace, no matter how slight. If you do not report an injury, you may jeopardize your right to collect workers' compensation payments as well as health benefits.

You can get the required reporting paperwork from Staffing.

Security

Heartwood Home Health & Hospice is committed to ensuring employees' security. Our premises are equipped with both security alarms that are active outside working hours and a fire alarm system. If you have a security concern or need more information about operating these systems, contact Staffing.

All employees are given identification cards when they join the Company. Wear your ID at all times while on Company business, whether you are on or off Company premises. If you leave Heartwood Home Health & Hospice, you must surrender your ID and any company keys you have been issued.

Emergency Measures (Inclement Weather)

We realize that bad weather or hazardous commuting conditions may occasionally make it impossible for employees to report to work on time.

However, you are expected to make a diligent effort to report to work when conditions have improved. If you determine that you are unable to report to work because of the conditions, inform your supervisor as soon as possible. Your absence will be charged to personal or vacation time.

If it becomes necessary to shut down the office due to weather or other emergency, every effort will be made to notify employees. If there is a question as to whether the office will be open, call your place of work. If there is no answer within one hour after the normal start time, assume the office is closed.

Corporate Communications & Technology

Use of Company Communication Systems

Because Heartwood Home Health & Hospice reserves the right to access any personal communication without prior notice, employees should not use company systems to transmit any messages or to access any information that they would not want a third party to hear or see. Although incidental and occasional personal use of the company's systems is permitted, any such personal use will be treated the same as all other communications under this policy. However, employees are at all times prohibited from accessing or downloading information from the Internet for personal use or from playing any sort of Internet or computer games on company

time.

Telephone Usage
The telephone system (including voicemail) at Heartwood Home Health & Hospice is the property of the company and is provided for business purposes. Heartwood Home Health & Hospice may periodically monitor the usage of the telephone systems to ensure compliance with this policy. Therefore, employees should not consider their conversations on the company's telephone system to be private.

Personal Mail
All mail delivered to the company is presumed to be related to company business. Mail sent to you at the company will be opened by the office and routed to your department. If you do not wish to have your correspondence handled in this manner, please have it delivered to your home.

Employee Benefits

Retirement Saving Plan

Heartwood Home Health & Hospice provides a 401(k) retirement savings plan for fulltime employees who have completed one year of service and otherwise qualify to participate. The plan includes a provision for employee tax deferred compensation contributions.

You can request a full copy of the plan summary description from Jessica Rockne.

Worker's Compensation

Heartwood Home Health & Hospice provides insurance to compensate for any illness or injury an employee might suffer while working on company premises, traveling on official company business, or attending an activity officially sponsored by the Company. If you become ill or injured, please get medical attention at once.

You must also report the details to your supervisor immediately. And you must complete a report for every injury, no matter how small, to keep the coverage in force and to get any benefits or other compensation to which you may be entitled.

Holidays

Heartwood Home Health & Hospice observes eight (8) holidays per year. A calendar of these holidays will be posted prior to January 1st of that year.

You will be paid for these holidays if you:

- are a full-time employee who has met the 90 day training period, and
- have worked the full day before and the full day after the holiday, unless time off has been approved in advance as vacation or personal days.
- If you call in sick the day before or after the holiday, you will not get paid for the holiday.

- Per visit employees are not eligible for paid holidays.

Due to business needs, some employees may be required to work on company holidays. Your supervisor or manager will notify you if this may apply to you.

If approved, you may work a scheduled holiday and take another day off within the calendar year as a floating holiday. This must be approved by your direct supervisor and the administrator at least two weeks in advance. If you do not use the floating holiday within the calendar year, you forfeit the day.

Paid Time Off (PTO)

Sick pay is paid as part of the PTO program. If you are sick for more than two days, Heartwood requires a note from your physician stating you are ok to return to work and excusing you from the time you missed. If you have called in sick, you will stay home and not take phone calls from staff or work from home. If you choose to do so, you will do this on your own time. If you are sick, stay home and be sick.

Vacation time is also part of the PTO program and must be requested at least two weeks in advance in an effort to cover staff schedule. All employees must complete a Time-off Request Form and submit it to the Office Manager for approval.

There are two paid time off (PTO) tiers:

Administrative PTO is defined as any salaried, hourly, or exempt employee.

1 Paid Time Off (PTO) – Paid time off is given to full-time employees and begins after the 90 day training period.
2 PTO accrues based on hours worked with a limit of 40 hours per year (.0385 hours earned per hour worked).
3 The accrual begins upon completion of the 90 day training period.
4 Employees cannot accrue more than 80 PTO hours, the accrual will simply stop.
5 PTO can be carried over to the next calendar year.
6 Employees must only take what they have accrued, they cannot go negative.
7 All requested time off must be approved by management and scheduling a minimum of two weeks in advance.
8 Sick days will be paid at part of the PTO program.
9 PTO does not apply to overtime calculation.
10 PTO will not be paid out upon termination of employment.

Heartwood Home Health & Hospice reserves the right not to approve a vacation request if it will interfere with Company operations or adversely affect coverage of job and staff requirements. Whenever possible, employees' requests for vacation will be accommodated, but where scheduling conflicts arise, seniority will prevail.

Clerical/Per Visit PTO is defined as per visit, non-exempt employee and field staff that is paid on a per visit or per diem basis.

1 Paid Time Off (PTO) – Paid time off after one year of service.

2 PTO accrues based on hours worked with a limit of 40 hours per year (.0193 hours earned per hour worked).
3 The accrual begins upon completion of the one year training period.
4 Employees cannot accrue more than 40 PTO hours, the accrual will simply stop.
5 PTO can be carried over to the next calendar year.
6 Employees must only take what they have accrued, they cannot go negative.
7 All requested time off must be approved by management and scheduling a minimum of two weeks in advance.
8 Sick days will be paid at part of the PTO program.
9 PTO will not be paid out upon termination of employment.
10 PTO cannot go negative

Heartwood Home Health & Hospice reserves the right not to approve a vacation request if it will interfere with Company operations or adversely affect coverage of job and staff requirements. Whenever possible, employees' requests for vacation will be accommodated, but where scheduling conflicts arise, seniority will prevail.

Medical Reimbursement

Medical reimbursement is offered to full-time employees for a total of $1200 per year; full-time is defined as working at least 35 hours per week. Part time employees will receive $600 per year; part time is defined as working at least 15 hours per week. Qualifying expenses can be found under IRS guidelines for medical deductions. You qualify for this benefit if you have met the 90 day training period. The amount of the reimbursement is prorated from the first day after the end of your training period. For example, if this day is Oct 12, the annual limit for expenses can only be $261.29 ($61.29 for 19 days in October and $100 in November and December, half of this for part-time employees).

All receipts must be dated after the last day of the training period, and all receipts must be turned in no later than five (5) days prior to your last day on the job.

All receipts must be submitted after the end of the month in which the expense was incurred. No expenses will be allowed after the end of the quarter. For example:

- January through March claims must be submitted by April 30.
- April through June claims must be submitted by July 31.
- July through September claims must be submitted by October 31.
- October through December claims must be submitted by January 31 of the following year.

Education Reimbursement

Education reimbursement is offered to full time employees in the amount of $1200 per year; $600 per year for part-time employees. If the employee terminates their employment with Heartwood within one year after the education reimbursement has been made, they must return the funds paid on their behalf back to Heartwood.

Meeting, Email, Text & Phone Etiquette

Meetings

1. Be on time (On time is two minutes early)
2. Meetings are the priority (unless it is an absolute emergency!)
3. Be considerate of others in the meeting.
    a. Please put your cell phone on vibrate.
    b. Don't leave to take a call unless an absolute emergency.
    c. No texting.
    d. Don't start side conversations.
    e. Listen to what is being said so we don't say it again.
4. Please no SCT's or JAVA's (Short cuts and Acronyms)
5. Be prepared
    a. Are you out this week?
    b. Are you gone next week?
    c. What is your schedule? Do you have it with you?
        i. Do you have a list of your patients with you?
    d. Do you have a pen and paper for notes?
6. Get supplies after the meeting if it means you're going to be late to the meeting.
7. Please talk about pertinent information in the meeting. Don't wait to have a meeting after the meeting. If your information is detailed and for a smaller staff we will schedule a side-meeting during the main meeting.

Email

1. ALL CAPS IN AN EMAIL IS YELLING!
2. If you are copied it is informational and you don't need to respond.
3. If is not required for you to respond to afterhours email. It will be sitting there for you the next day.
4. Respond to all email. With a minimum of I got your email.

Text

1. Please respond to an 'all staff' text that requires a response.
    a. Please cancel tomorrow's visit for Patient Jones. Please respond
    b. Can you pick up a visit? Please respond
    c. Patient Smith Passed away. Not necessary to respond
2. Do you want texts on your day off?

Phone

1. Listen to your voicemail before you call the person back.
2. When you leave a voicemail give some detail. Not, "Please call me".
3. When you call the office, "I'm returning Lee's call".
4. When you call field staff please say something like, "Hi this is Lee, please call me at your earliest convenience to talk about Patient Smith".
5. Please respond to your voice mail. If it is your day off, please respond at your earliest convenience.

Calls after hours

1. Phone calls and texts should not be made to staff members outside of the 9-5 working hours.
1. If you have something that must be resolved after hours, please call the office number to reach the on call nurse.
2. If you have something you want to communicate to someone specific, please email that person so they will receive it the next day.

Email (and text) Communication

Sometimes communicating in email and text can be difficult because you cannot convey the proper emotions and your words may not come across the way you intended. Here are a few rules to follow to help. When using only words does not work, call the person to make sure they understand you are sympathetic or understanding.

1. Take Another Look Before You Hit Send

With email, what can be misunderstood will be misunderstood. That's why you should be doubly careful with everything you write. One strategy to avoid misinterpretations is to allow every message at least some minutes of rest after you have finished it before you send. Reread and reconsider the whole message when you return to it, possibly from the recipient's perspective. Short and simple emails can be vague and the recipient may be uncertain of your intended meaning.

2. Do Let People Know Their Mail Has Been Received

Sometimes, emails get lost or fall prey to overeager spam filtering. When you get an email or text, please respond that you received it; especially with patient's care at stake. Even a simple, "ok" or "yes" is fine. This helps everyone know that you got the message and you understand. If someone asks you to do something, please let them know you've completed the task with a simple, "done".

Even if you do plan to reply later, an email acknowledging receipt and letting the sender know when you will get back to them can be welcome.

If we send a mass text to see if you can help with picking up a patient, please text back "no". This way I know you received the text, and can move on.

Acknowledgement of receipt and understanding – Employee Copy
I acknowledge that I have received the Heartwood Home Health & Hospice Employee Handbook and that I have read and understand the policies.

I understand that this Handbook represents only current policies and benefits, and that it does not create a contract of employment. Heartwood Home Health & Hospice retains the right to change these policies and benefits, as it deems advisable.

Unless expressly proscribed by statute or contract, my employment is "at will." I understand that I have the right to terminate my employment at any time, with or without cause or notice, and that the Company has the same right. I further understand that my status as an "at will" employee may not be changed except in writing and signed by the President of the Company.

I understand that the information I come into contact with during my employment is proprietary to the Company and accordingly, I agree to keep it confidential, which means I will not use it other than in the performance of my duties or disclose it to any person or entity outside the Company. I understand that I must comply with all of the provisions of the Handbook to have access to and use Company resources. I also understand that if I do not comply with all provisions of the Handbook, my access to Company resources may be revoked, and I may be subject to disciplinary action up to and including discharge.

I further understand that I am obligated to familiarize myself with the Company's safety, health, and emergency procedures as outlined in this Handbook or in other documents.

Signature 4/4/12
Date

Please Print Your Name

UTAH COURT RULES ANNOTATED

*** CURRENT THROUGH RULES EFFECTIVE AS OF JULY 16, 2013. ***

STATE RULES
UTAH RULES OF CIVIL PROCEDURE
PART III. PLEADINGS, MOTIONS, AND ORDERS

URCP Rule 11 (2013)

Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions

(a) *Signature.*

(1) Every pleading, written motion, and other paper shall be signed by at least one attorney of record or, if the party is not represented by the party.

(2) A person may sign a paper using any form of signature recognized by law as binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit a declaration pursuant to *Utah Code Section 78B-5-705*. If a statute requires an affidavit or a notarized, verified or acknowledged signature and the party electronically files the paper, the signature shall be notarized pursuant to *Utah Code Section 46-1-16*.

(3) An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) *Representations to court.* -- By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), 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,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) 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;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) *Sanctions.* -- If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How initiated.*

(A) *By motion.* -- A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule

5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(B) *On court's initiative.* -- On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of sanction; limitations.* -- A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* -- When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

HISTORY: Amended effective Sept. 4, 1985; April 1, 1997; April 1, 2008; April 1, 2013

NOTES: Advisory Committee Note. -- The 1997 amendments conform state Rule 11 with federal Rule 11. One difference between the rules concerns holding a law firm jointly responsible for violations by a member of the firm. Federal Rule 11(c)(1)(A) states: "Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." Under the federal rule, joint responsibility is presumed unless the judge determines not to impose joint responsibility. State Rule 11(c)(1)(A) provides: "In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees." Under the state rule, joint responsibility is not presumed, and the judge may impose joint responsibility in appropriate circumstances. What constitutes appropriate circumstances is left to the discretion of the judge, but might include: repeated violations, especially after earlier sanctions; firm-wide sanctionable practices; or a sanctionable practice approved by a supervising attorney and committed by a subordinate.

Amendment Notes. --The 2013 amendment deleted subdivision (d), which read: "Inapplicability to discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37."

Compiler's Notes. -- This rule is substantially similar to *Rule 11, F.R.C.P.*

NOTES TO DECISIONS

Adoption proceeding.
Amendment of complaint.
Amount of sanctions.
Appeals.
Attorney fees.
Bad faith not found.
Due process.
Hearing.
Imposition of sanctions.
Nature of duty imposed.
Reasonable inquiry.
Sanctions not warranted.

Sanctions warranted.
Signature requirement.
Violation.
-- Question of law.
-- Sanctions.
-- -- Attorney fees.
-- Standard.
Cited.

Adoption proceeding.

In an adoption proceeding, the trial court properly imposed Rule 11 sanctions against attorney who failed to make reasonable inquiry into existing law, made allegations in the amended petition that were not well grounded in fact, failed to obtain a preplacement adoptive study or temporary placement order, failed to comply with the Interstate Compact on the Placement of Children, knew or should have known the natural mother's consent was flawed, knew the natural father would not consent to the adoption, and failed to make a reasonable inquiry as to whether the natural father's parental rights were terminable. *Giffen v. R.W.L., 913 P.2d 761 (Utah Ct. App. 1996).*

Amendment of complaint.

Amendment by an attorney of the facts stated in a complaint was sufficient to establish those facts as they would have been by a verified complaint before the changes made by this rule making verification unnecessary. *Calder v. Third Judicial Dist. Court ex rel. Salt Lake County, 2 Utah 2d 309, 273 P.2d 168 (1954).*

Amount of sanctions.

Trial court did not abuse its discretion in denying certain attorney's fees and costs in an award of sanctions under this rule after it considered the amount of work necessary to defend the claims presented and declined to award the defendant for work and costs it believed were not required. *Pennington v. Allstate Ins. Co., 973 P.2d 932 (Utah 1998).*

Appeals.

After voluntary dismissal by plaintiffs, the trial court's retention of jurisdiction to enforce sanctions under this rule did not legally prejudice plaintiffs and there was no final appealable order. *Barton v. Utah Transit Auth., 872 P.2d 1036 (Utah 1994).*

Attorney fees.

Because any factual errors made by petitioner's counsel were insignificant, there was no violation of this rule. Accordingly, when petitioner's counsel successfully opposed the motion for sanctions against him, he was properly awarded fees as the prevailing party. *K.F.K. v. T.W., 2005 UT App 85, 520 Utah Adv. Rep. 12, 110 P.3d 162.*

Petitioner's counsel, having prevailed on the motion for Rule 11 sanctions against him, was entitled to an award of attorney's fees as the prevailing party. Having received fees below and having prevailed on appeal, petitioner's counsel was entitled to attorney's fees incurred on appeal. *K.F.K. v. T.W., 2005 UT App 85, 520 Utah Adv. Rep. 12, 110 P.3d 162.*

It was within the district court's discretion to award appellee personal representative additional fees incurred in litigating the amount of reasonable attorney fees incurred on appeal after appellant filed a petition to remove the personal representative that was brought without merit and not in good faith and failed to demonstrate that the district court abused its discretion in awarding additional fees on remand. *Ninow v. Copier (In re Estate of Pahl), 2011 UT App 56, 249 P.3d 567.*

Bad faith not found.

Debt collector's actions clearly complied with this rule; as a Utah attorney, the collector had a good faith basis to file suit seeking shoplifting fees for a bounced check where 1) he pleaded in the alternative for fees permitted under the bounced check statute; 2) several state court judges had previously assessed shoplifting fees for bounced checks; and 3) the Utah Supreme Court had never addressed the issue. *Johnson v. Riddle, 296 F. Supp. 2d 1283 (D. Utah 2003).*

Due process.

Before imposing sanctions on a party under this rule, due process requires that the party receive adequate notice and an opportunity to respond, either orally or in writing; a formal evidentiary hearing is not required, however. *Gildea v. Guardian Title Co., 2001 UT 75, 31 P.3d 543.*

When a court considers sanctions on its own initiative, due process requirements are met by issuing an order directing the attorney, law firm, or party to show cause why it has not violated this rule, and allowing the party a reasonable time in which to file a response. *Gildea v. Guardian Title Co., 2001 UT 75, 31 P.3d 543.*

Hearing.

Trial court did not demonstrate bias in holding a hearing under this rule on its own motion; as required, the court described the conduct that appeared to violate the rule and offered the affected party an opportunity to demonstrate that the court's concerns were unfounded. *Edwards v. Powder Mt. Water & Sewer, 2009 UT App 185, 214 P.3d 120.*

Imposition of sanctions.

In awarding attorney fees against the party making a meritless motion to disqualify, trial judge did not purport to act under this rule, but rather exercised the court's inherent powers to impose monetary sanctions on an attorney for wasting judicial resources. *Griffith v. Griffith, 1999 UT 78, 985 P.2d 255.*

Trial court properly awarded attorney's fees to defendant as a sanction against plaintiff whose brief was extraordinarily deficient. *Nipper v. Douglas, 2004 UT App 118, 497 Utah Adv. Rep. 11, 90 P.3d 649.*

A movant must strictly comply with the requirement in this rule that a motion for sanctions be served on opposing counsel as a precondition to filing the motion with the court. *Barnard v. Mansell, 2009 UT App 298, 221 P.3d 874.*

When husband filed a second motion to disqualify the judge for the purpose of delay so his new attorney could prepare, the motion was filed for improper purposes and was factually meritless, both of which were independent grounds for sanctions. (Unpublished decision.) *Henshaw v. Henshaw, 2012 UT App 56, 702 Utah Adv. Rep. 13, 271 P.3d 837.*

Nature of duty imposed.

This rule emphasizes an attorney's public duty as an officer of the court, as opposed to the attorney's private duty to represent a client's interest zealously. *Clark v. Booth, 821 P.2d 1146 (Utah 1991).*

Reasonable inquiry.

Certification by an attorney "that to the best of his knowledge, information, and belief formed after a reasonable inquiry the complaint is well grounded in fact and is warranted by existing law" does not require him to obtain a favorable expert medical opinion before filing a medical malpractice action. *Deschamps v. Pulley, 784 P.2d 471 (Utah Ct. App. 1989).*

Under this rule, a party need not have reached the correct conclusion; he need only have made a reasonable inquiry. *Barnard v. Utah State Bar, 857 P.2d 917 (Utah 1993).*

Because attorney's reading of the law as it existed when he commenced his action was at least plausible, sanctions under this rule were not warranted. *Barnard v. Utah State Bar, 857 P.2d 917 (Utah 1993).*

Sanctions were proper under this rule against attorney who made misrepresentations of fact before the district court, having failed to make an inquiry into the facts that was reasonable under the circumstances. *Morse v. Packer, 2000 UT 86, 15 P.3d 1021.*

Sanctions not warranted.

On motions to impose sanctions against plaintiff Utah State Bar filed by defendants engaged in practice of public adjusting and based on the grounds that (1) the original complaint named as plaintiff the "Board of Commissioners of the Utah State Bar" instead of the "Utah State Bar," (2) there were no facts to support the claim that one defendant was engaged in public adjusting, and (3) there was no basis in the law to support the Bar's assertion in its original complaint that first-party adjusting constituted the unauthorized practice of law, motions were properly denied since the misnomer of plaintiff in the original complaint was a technical error which did not cause defendants any prejudice and was corrected in the Bar's amended complaint, since Bar counsel had evidence that defendants were engaged in public adjusting, and since law as to first-party adjusting was unsettled. *Utah State Bar v. Sorensen, 910 P.2d 1227 (Utah 1996).*

Where a party's request that the trial court interpret the terms of a divorce decree was neither meritless nor objectively unreasonable under the circumstances, sanctions were not warranted. *Taylor v. Hansen, 958 P.2d 923 (Utah Ct. App. 1998).*

A purported factual finding, drafted by counsel for the prevailing party, simply paraphrasing the language of this Rule, without any detailed factual findings particularizing its conclusions, did not support the imposition of sanctions. *Griffith v. Griffith, 1999 UT 78, 985 P.2d 255.*

Upon finding ethical violation by attorney in holding improper ex parte conversation with employee of opposing party, and improper refusal to produce transcript of conversation when requested, court could not impose sanctions under this rule without finding that attorney had violated this rule and affording attorney notice and an opportunity to respond. The correct remedy was an award, under *R. Civ. P. 37(a)(4)*, of the costs and attorney fees incurred by opposing party in obtaining an order to produce the transcript. *Featherstone v. Schaerrer, 2001 UT 86, 34 P.3d 194.*

Award of sanctions was not appropriate against a party who advanced an argument that was inventive but not entirely frivolous; the party pointed to cases from other jurisdictions to support its position and gave the court the opportunity to clarify a rule. *Aurora Credit Servs. v. Liberty West Dev., Inc., 2007 UT App 327, 171 P.3d 465.*

Sanctions warranted.

The sanction of attorney's fees was proper under this rule where a plaintiff brought an action to force an automobile insurer to pay unreasonable and unnecessary medical expenses for alleged injuries suffered in a car accident for the purpose of making the plaintiff's medical expenses exceed the personal injury protection cap of *§ 31A-22-308*, existing contract law precluded the plaintiff from recovering such medical expenses against the insurer, and evidence established that the plaintiff's attorney's primary motive in pursuing the claims was to collect attorney's fees. *Pennington v. Allstate Ins. Co., 973 P.2d 932 (Utah 1998).*

Signature requirement.

This rule, as in effect in 1973, did not supersede a statutory requirement that objections to a proposed water-rights determination be duly verified on oath. *Penta Creeks, LLC v. Olds (In re General Determination of Rights to the Use of Water), 2008 UT 25, 182 P.3d 362*

Violation.

-- Question of law.

Whether specific conduct amounts to a violation of this rule is a question of law. *Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989); Jeschke v. Willis, 811 P.2d 202 (Utah Ct. App. 1991).*

-- Sanctions.

This rule gives trial courts great leeway to tailor the sanction to fit the requirements of the particular case. *Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989); Giffen v. R.W.L., 913 P.2d 761 (Utah Ct. App. 1996); Bailey-Allen Co. v. Kurzet, 945 P.2d 180 (Utah Ct. App. 1997).*

Trial court erred in imposing sanctions in its final order without affording plaintiff a hearing or any other opportunity to respond. *Poulsen v. Frear, 946 P.2d 738 (Utah Ct. App. 1997).*

-- -- Attorney fees.

Attaching the wrong document to a complaint violated this rule because a reasonable inquiry would have revealed the mistake; award of attorney fees was appropriate because the error caused defendants to incur legal expense in researching the validity of an irrelevant document and preparing a motion to dismiss based on it. *Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989).*

Award of costs and attorney fees was an appropriate sanction for attempting to go forward with a class action that, in light of the complete resolution of the matter eleven months prior, was "unconscionable and beyond reason." *Schoney v. Memorial Estates, Inc., 863 P.2d 59 (Utah Ct. App. 1993).*

Award of attorney fees to landowners against adjacent landowners, on the basis that the adjacent landowners acted in bad faith by seeking attorney fees from landowners after obtaining a quitclaim deed from landowner for the disputed property, could not be supported under this rule, because when adjacent landowners filed their claim there was no clear prohibition on the recovery of attorney fees in undisputed quiet title actions and finding was not made as to bad faith on part of the adjacent landowner. *Chipman v. Miller, 934 P.2d 1158 (Utah Ct. App. 1997).*

Because submission of voluminous affidavits containing testimony that could easily have been introduced at trial is not authorized by existing law, the trial court did not err in awarding attorney fees to the other party. *Hudema v. Carpenter, 1999 UT App 290, 989 P.2d 491*

-- Standard.

Sanctions were improper against an attorney, where opposing parties conceded that no particular document was signed in violation of the rule, but simply argued that even if the attorney believed the case was well grounded when he filed the complaint, he should have known after he met with counsel for defendants that the case could not go forward. *Jeschke v. Willis, 811 P.2d 202 (Utah Ct. App. 1991).*

Utah appellate courts should use the three-standard approach in reviewing a trial court's Rule 11 findings. This approach includes: (1) reviewing the trial court's findings of fact under the clearly erroneous standard; (2) reviewing the trial court's ultimate conclusion that Rule 11 was violated and any subsidiary legal conclusions under the correction of error standard; and (3) reviewing the trial court's determination as to the type and amount of sanction to be imposed under the abuse of discretion standard. *Barnard v. Sutliff, 846 P.2d 1229 (Utah 1992); Giffen v. R.W.L., 913 P.2d 761 (Utah Ct. App. 1996).*

The determination of whether conduct violates Rule 11 is made on an objective basis. *Giffen v. R.W.L., 913 P.2d 761 (Utah Ct. App. 1996).*

Trial court's findings of fact are reviewed under a clearly erroneous standard; its conclusion that this rule was violated is reviewed under a correction of error standard; and the court's determination as to the type and amount of sanctions is reviewed under an abuse of discretion standard. *Griffith v. Griffith, 1999 UT 78, 985 P.2d 255.*

Cited in *Walker v. Carlson, 740 P.2d 1372 (Utah Ct. App. 1987); State v. Perdue, 813 P.2d 1201 (Utah Ct. App. 1991); Rimensburger v. Rimensburger, 841 P.2d 709 (Utah Ct. App. 1992); Crowther v. Mower, 876 P.2d 876 (Utah Ct. App. 1994); Astill v. Clark, 956 P.2d 1081 (Utah Ct. App. 1998); Stavros v. Office of Legislative Research & Gen. Counsel, 2000 UT 63, 15 P.3d 1013; Mi Vida Enters. v. Steen-Adams, 2005 UT App 400, 122 P.3d 144; Workers Comp. Fund v. Argonaut Ins. Co., 2011 UT 61, 266 P.3d 792.*

COLLATERAL REFERENCES

Utah Law Review. -- Recent Developments in Utah Law -- Legislative Enactments -- Attorney's Fees, *1989 Utah L. Rev. 342*

Case Law Development: I. Appellate Review and Procedure, *1998 Utah L. Rev. 585.*

Brigham Young Law Review. -- Curbing Discovery Abuse in Civil Litigation: Enough Is Enough, *1981 B.Y.U. L. Rev. 579*

Curbing Discovery Abuse in Civil Litigation: We're Not There Yet, *1981 B.Y.U. L. Rev. 597.*

Note, Appellate Review of Rule 11 Issues -- De Novo or Abuse of Discretion? *Thomas v. Capital Security Services, Inc., 1989 B.Y.U. L. Rev. 877.*

Rule 11 and Federalizing Lawyer Ethics, *1991 B.Y.U. L. Rev. 959.*

Fines Under New *Federal Civil Rule 11*: The New Monetary Sanctions for the "Stop-and-Think-Again" Rule, *1993 B.Y.U. L. Rev. 879.*

Am. Jur. 2d. -- *61A Am. Jur. 2d Pleading §§ 339* to *349*

C.J.S. -- 71 C.J.S. Pleading §§ 339 to 366

A.L.R. -- Liability of attorney, acting for client, for malicious prosecution, *46 A.L.R.4th 249.*

Inherent power of federal district court to impose monetary sanctions on counsel in absence of contempt of court, *77 A.L.R. Fed. 789.*

Comment Note -- General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, *95 A.L.R. Fed. 107.*

Imposition of sanctions under *Rule 11, Federal Rules of Civil Procedure*, pertaining to signing and verification of pleadings, in actions for defamation, *95 A.L.R. Fed. 181.*

Imposition of sanctions under *Rule 11, Federal Rules of Civil Procedure*, pertaining to signing and verification of pleadings, in action for wrongful discharge from employment, *96 A.L.R. Fed. 13.*

Imposition of sanctions under *Rule 11, Federal Rules of Civil Procedure*, pertaining to signing and verification of pleadings, in actions for securities fraud, *97 A.L.R. Fed. 107.*

Imposition of sanctions under *Rule 11, Federal Rules of Civil Procedure*, pertaining to signing and verification of pleadings, in actions for infliction of emotional distress, *98 A.L.R. Fed. 442.*

Imposition of sanctions under *Rule 11, Federal Rules of Civil Procedure*, pertaining to signing and verification of pleadings, in antitrust actions, *99 A.L.R. Fed. 573.*

Procedural requirements for imposition of sanctions under Rule 11, Federal *Rules of Civil Procedure, 100* A.L.R. Fed. 556.

Rule 11 Fed. R. Civ. P.

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Notes

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007.)

Notes of Advisory Committee on Rules—1937

This is substantially the content of [former] Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare [former] Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4, and Great Australian Gold Mining Co. v. Martin, L. R., 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) §9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) §7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as:

U.S.C., Title 28:

§381 [former] (Preliminary injunctions and temporary restraining orders)

§762 [now 1402] (Suit against the United States).

U.S.C., Title 28, §829 [now 1927] (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see Pa.Stat.Ann. (Purdon, 1931) see 12 P.S.Pa., §1222; for the rule in equity itself, see Greenfield v. Blumenthal, 69 F.2d 294 (C.C.A. 3d, 1934).

Notes of Advisory Committee on Rules—1983 Amendment

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, Federal Practice and Procedure: Civil §1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action,'(2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure 64–65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, Federal Practice

7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, (1980); Hall v. Cole, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, e.g., Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. See, e.g., Heart Disease Research Foundation v. General Motors Corp., 15 Fed.R.Serv. 2d 1517, 1519 (S.D.N.Y. 1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F.Supp. 975 (E.D.Pa. 1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after in camera inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special

circumstances that often arise in pro se situations. See Haines v. Kerner 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed. R. Civ. P. 11 , 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. See Murchison v. Kirby, 27 F.R.D. 14 (S.D.N.Y. 1961); 5 Wright & Miller, Federal Practice and Procedure: Civil §1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. See National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The reference in the former text to wilfullness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. See North American Trading Corp. v. Zale Corp., 73 F.R.D. 293 (S.D.N.Y. 1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, Federal Practice and Procedure: Civil §1334 (1969); 2A Moore, Federal Practice

11.02, at 2104 n.8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See Browning Debenture Holders' Committee v. DASA Corp., supra. This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to "other papers" in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

Notes of Advisory Committee on Rules—1987 Amendment

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on Rules—1993 Amendment

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); J. Solovy, The Federal Law of Sanctions (1991); G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"—and hence certifying to the district court under

Rule 11—those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. 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.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be

specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such 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), etc. See Manual for Complex Litigation, Second, §42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. 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: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the 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.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for [subdivision] (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The sanction should be imposed on the persons—whether attorneys, law firms, or

parties—who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. Cf. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for causing a violation of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See Willy v. Coastal Corp., ____ U.S. ____ (1992); Business Guides, Inc. v. Chromatic Communications Enter. Inc., ____ U.S. ____ (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be

served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. 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 refuses 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.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11—whether the movant or the target of the motion—reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that

this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what—if any—sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. §1927. See Chambers v. NASCO, ____ U.S. ____ (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11—notice, opportunity to respond, and findings—should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

Committee Notes on Rules—2007 Amendment

The language of Rule 11 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Delivery Certificate

I hereby certify that two true and correct copies of the foregoing **brief** were served by the method(s) indicated below and addressed to the following this 29th day of September, 2017.

Gary Guelker (Hand Delivered)
Janet Jenson
747 East South Temple #130
Salt Lake City, Utah 84102

( ) U.S. Mail, Postage Prepaid
(x) Hand Delivered
( ) Overnight Mail
( ) Facsimile
( ) E-mail
( ) Electronic Filing

Robert H. Wilde