WHEN COUNSEL SCREWS UP: THE IMPOSITION AND CALCULATION OF ATTORNEY FEES AS SANCTIONS

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I. INTRODUCTION

While a body of law has emerged in Washington that permits the courts to impose fees against a party or the party's counsel as a sanction, that body of law has not been coherently examined in the academic setting nor carefully and consistently analyzed in the case law.[1] Sanctions can be imposed at any stage of the litigation. For instance, sanctions

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1. Courts are generally not fond of battles between attorneys. Accordingly, it is advisable that attorneys seek sanctions against opposing parties sparingly. As the Washington Supreme Court warned in *Wash. Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 356, 858 P.2d 1054 (1993):

> The purposes of sanctions are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctions should include a compensation award. However, we caution that the sanctions rules are not "fee shifting" rules. Furthermore, requests for sanctions should not turn into satellite litigation or become a "cottage industry" for lawyers.

may be imposed for filing a baseless lawsuit or defense,[2] for filing a frivolous appeal,[3] or for abusing the discovery process.[4]

To compound the problem of a lack of rigor in the analysis of sanctions, the law relating to the calculation of the appropriate fee to be imposed as a sanction is even less certain. In Washington, the courts tend to favor the lodestar approach when calculating fee awards. Under the lodestar methodology, the court must: (1) determine the reasonable number of hours expended to secure a successful recovery for the client; (2) determine the reasonableness of the attorney's hourly rate; and then (3) multiply the reasonable hourly rate by the reasonable number of hours incurred, retaining the discretion to adjust the amount upward or downward as justice requires.[5]

While the Washington Supreme Court has warned that the lodestar method is not applicable in every situation,[6] Washington courts have inconsistently applied the method in situations where a party or attorney is being sanctioned for misconduct, leading to confusion as to how fees should be calculated when sanctions are warranted.[7] In the absence of some articulable standard for calculating fees as sanctions, courts may feel free to award insufficient or excessive fees unconnected to the actual expense imposed by the sanctionable conduct upon the opposing party or attorney.

This Article explores and clarifies the principles underlying the imposition of attorney fees as a sanction, providing an overview of the various ways in which attorneys can be sanctioned when they screw up. The Article discusses Washington law as it applies to sanctions and briefly analyzes how Washington courts look to comparable federal law for guidance. Part II begins by analyzing Washington Civil Rule (CR) 11, which prohibits baseless filings at the trial court level. Part III turns to sanctions under RCW 4.84.185. Part IV addresses sanctions under the

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2. WASH. SUP. CT. CIV. R. 11; WASH. REV. CODE § 4.84.185 (2006).

3. WASH. R. APP. P. 18.9(a).

4. WASH. SUP. CT. CIV. R. 26(g). In addition, a court has the inherent power to impose sanctions for an abuse of the discovery process. WASH. SUP. CT. CIV. R. 37; WASH. REV. CODE § 2.28.010(2)–(3) (2004). *See also* State v. S.H., 102 Wash. App. 468, 473, 8 P.3d 1058 (2000) (noting a court has the power to fashion and impose appropriate sanctions under its inherent authority even where such sanctions are not statutorily authorized); Wilson v. Henkle, 45 Wash. App. 162, 174–75, 724 P.2d 1069 (1986) (recognizing the courts have the inherent power to impose sanctions against an attorney for inappropriate and improper conduct amounting to bad faith).

5. *See* Morgan v. Kingen, 166 Wn.2d 526, 539, 210 P.3d 995 (2009); Mahler v. Szucs, 135 Wash. 2d 398, 433–34, 957 P.2d 632 (1998).

6. *See* Brand v. Dep't of Labor & Indus., 139 Wash. 2d 659, 989 P.2d 1111 (1999) (declining to use the method in calculating worker compensation fee awards).

7. *See, e.g.*, Highland Sch. Dist. No. 203 v. Racy, 149 Wash. App. 307, 314–316, 202 P.3d 1024 (2009) (noting that the trial court was not mandated to follow the lodestar approach because its application was optional, but nevertheless analyzing the trial court's decision under that method).

Rules of Appellate Procedure, and then Part V discusses sanctions related to the discovery process. The Article concludes by arguing that much of the confusion surrounding the calculation of attorney fees as a sanction will be resolved by applying the lodestar method in all four areas of the law.

II. AN OVERVIEW OF CR 11

CR 11 was adopted "to deter baseless filings and to curb abuses of the judicial system."[8] It applies to every pleading, written motion, and legal memorandum filed or served during the litigation. CR 11 is not available, however, if another, more explicit court rule applies.[9] The rule does not apply in appellate proceedings; instead, the appellate courts apply a similar standard under Rules of Appellate Procedure (RAP) Rule 18.9(a).[10]

CR 11 requires an attorney to sign pleadings, motions, or legal memoranda. An attorney's signature certifies that the attorney believes, after "an inquiry reasonable under the circumstances," that the pleading, motion or legal memorandum is: (1) well grounded in fact; (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; and (3) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[11] Furthermore, the attorney's signature certifies that "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."[12] If an attorney signs a pleading, motion, or legal memorandum in violation of the rule, the court may impose an "appropriate sanction" against the attorney, the

8. Bryant v. Joseph Tree, Inc., 119 Wash. 2d 210, 219, 829 P.2d 1099 (1992) (noting the rule addresses two separate problems: baseless filings and filings made for an improper purpose). For an excellent discussion of the early cases implementing CR 11 and the policy questions surrounding the rule, see Frederic C. Tausend and Lisa L. Johnsen, *Current Status of Rule 11 in the Ninth Circuit and Washington State*, 14 U. PUGET SOUND. L. REV. 419 (1991). *See also* Peter Ramels, *Factual Frivolity: Sanctioning Clients Under Rule 11*, 65 WASH. L. REV. 939 (1990).

9. Wash. Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 339–40, 858 P.2d 1054 (1993); Biggs v. Vail (*Biggs II*), 124 Wash. 2d 193, 197, 876 P.2d 448 (1994).

10. 3 Karl B. Tegland, Wash. Prac. Series: Rules Practice at 445, 456 (6th ed. 2004) (noting the 1994 amendments to RAP 18.7 make it clear that CR 11 no longer applies on appeal). *See also,* Eugster v. City of Spokane, 139 Wash. App. 21, 34, 156 P.3d 912 (2007) (awarding attorney fees under RAP 18.9 for defending against a frivolous appeal).

11. WASH. SUP. CT. CIV. R. 11(a).

12. *Id.*

represented person, or both.[13] A court may impose sanctions pursuant to motion or on its own initiative.[14]

The party moving for sanctions bears the burden to justify the request.[15] In addition, the party seeking sanctions under CR 11 should notify the offending party of the objectionable conduct and provide that person with an opportunity to mitigate the sanction by amending or withdrawing the paper.[16] The counterpart federal rule provides a party with a twenty-one day safe harbor period during which the challenged pleading may be withdrawn.[17]

Washington courts have developed criteria to determine whether the imposition of sanctions is appropriate. In *Miller v. Badgley*,[18] the court of appeals introduced a test to determine when a court may impose CR 11 sanctions.[19] The court explained that sanctions under CR 11 may be imposed if any one of three conditions are met: (1) the attorney failed to conduct a reasonable inquiry into the facts supporting the paper; (2) the attorney failed to conduct a reasonable inquiry into the law to ensure that the pleading filed is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) the attorney filed the pleading for an improper purpose such as delay, harassment, or to increase the costs of litigation.[20] In *Blair v. GIM Corp.*,[21] the court of appeals further explained that a filing is baseless only if it is not well grounded in fact, or not warranted by existing law or a good faith argument for the alteration of existing law.[22] These cases provide the necessary framework to determine whether the imposition of sanctions is appropriate.

In 2005, the Washington Supreme Court amended CR 11.[23] The amended rule permits attorneys to advance legal arguments seeking a good faith establishment of new law without risking sanctions.[24] It also authorizes the imposition of sanctions for baseless denials of factual con-

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13. CR 11 also requires a similar certification from an attorney helping to draft pleadings, motions, or other documents filed by otherwise self-represented persons; however, the attorney "may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient." WASH. SUP. CT. CIV. R. 11(b).

14. WASH. SUP. CT. CIV. R. 11(a).

15. Biggs v. Vail (*Biggs II*), 124 Wash. 2d 193, 202, 876 P.2d 448 (1994).

16. *Id.* at 198 n.2.

17. FED. R. CIV. P. 11(c)(1)(A).

18. 51 Wash. App. 285, 753 P.2d 530 (1988).

19. *Id.* at 300.

20. *Id.*

21. 88 Wash. App. 475, 945 P.2d 1149 (1997).

22. *Id.* at 482–83.

23. Amendment to WASH. SUP. CT. CIV. R. 11, 154 Wash. 2d 1114–15 (2005).

24. WASH. SUP. CT. CIV. R. 11.

tentions, like those found in answers.[25] These amendments make CR 11 more closely parallel Federal Rules of Civil Procedure 11 (Rule 11). Moreover, the rule now reflects the three conditions outlined in *Miller*.[26] Nonetheless, the courts remain divided over whether a finding that one of these conditions has been met is enough to satisfy the rule or whether a finding that all three conditions have been met is required before sanctions can be imposed.[27]

At a minimum, CR 11 requires attorneys to undertake a reasonable inquiry into the facts and the law before filing any pleading. The rule "requires attorneys to stop, think, and investigate more carefully before serving and filing papers."[28] It was intended to deter the "shoot-first-and-ask-questions-later" approach to the practice of law.[29] The following subsections examine aspects of the rule in greater detail.

A. Attorneys Must Make a Reasonable Inquiry into the Law and the Facts

While CR 11's mandate is ongoing throughout the litigation,[30] sanctions are not appropriate merely because an action's factual basis ultimately proves deficient or a party's view of the law proves incorrect.[31] Similarly, sanctions against an attorney are not warranted merely because the trier of fact found the attorney's client not credible.[32]

Because there are instances where the imposition of sanctions is inappropriate, courts must carefully evaluate whether an attorney's inquiry into the law and the facts was reasonable. Washington courts evaluate the reasonableness of the attorney's pre-filing inquiry under the objective

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25. WASH. SUP. CT. CIV. R. 11(a).

26. *Compare* WASH. SUP. CT. CIV. R. 11, *with* Miller v. Badgley, 51 Wash. App. 285, 300, 753 P.2d 530 (1988).

27. In *Miller*, 51 Wash. App. at 300, 301–02, and *McClure v. Tremaine*, 77 Wash. App. 312, 318, 890 P.2d 466 (1995), the courts concluded that a finding of one element is sufficient to impose sanctions. On the other side, in *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash. App. 106, 110–11, 780 P.2d 853 (1989), and *Harrington v. Pailthorp*, 67 Wash. App. 901, 910, 841 P.2d 1258 (1992), the courts determined that all three elements must be established before imposing sanctions.

28. Bryant v. Joseph Tree, 119 Wash. 2d 210, 219, 829 P.2d 1099 (1992) (quoting FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. 165, 192 (1983)).

29. Watson v. Maier, 64 Wash. App. 889, 898, 827 P.2d 311 (1992).

30. *Doe*, 55 Wash. App. at 114 (explaining that once reasonable inquiry reveals party should be dismissed, signature on subsequent pleadings in furtherance of claim is a violation of CR 11); MacDonald v. Korum Ford, 80 Wash. App. 877, 888, 912 P.2d 1052 (1996) (finding a violation of CR 11 where, after client's deposition, attorney lacked factual basis for pursuing claim).

31. Roeber v. Dowty Aerospace Yakima, 116 Wash. App. 127, 142, 64 P.3d 691 (2003) (determining that the failure to establish prima facie civil rights case did not equate with complete lack of factual basis).

32. Saldivar v. Momah, 145 Wash. App. 365, 403, 186 P.3d 1117 (2008), *as amended* (July 15, 2008).

standard of "'reasonableness under the circumstances.'"[33] In making this determination, the courts may consider such factors as:

> [T]he time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.[34]

In *Cascade Brigade v. Economic Development Board for Tacoma-Pierce County*,[35] the court of appeals mentioned additional factors to be considered when determining the reasonableness of an attorney's prefiling inquiry: "The knowledge that reasonably could have been acquired at the time the pleading was filed, the type of claim and the difficulty of acquiring sufficient information, which party has access to the relevant facts, and the significance of the claim in the pleading as a whole."[36] Relying on the client for the facts may not be sufficient to satisfy the requirements of CR 11.[37] Moreover, an attorney's subjective belief about the veracity of the pleading is irrelevant.[38]

B. Attorneys May Not File Pleadings for an Improper Purpose

CR 11 sanctions are appropriate if the pleading is filed for an improper purpose. For example, in *Suarez v. Newquist*,[39] the attorney attempted to file multiple affidavits of prejudice.[40] After the trial court rejected the affidavits, the attorney then attempted to file an affidavit of his own.[41] After the trial judge rejected that affidavit, the attorney admitted he was unprepared to argue the summary judgment motion. Nevertheless, the trial court did not impose CR 11 sanctions.[42] The court of appeals determined that the attorney misused the affidavits to improperly delay the proceeding, held that the trial court abused its discretion in not imposing sanctions, and remanded to the trial court to impose sanctions

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33. *Bryant*, 119 Wash. 2d at 220 (citing FED. R. CIV. P. 11 advisory committee note, 97 F.R.D 165, 198 (1983)).

34. *Id.* at 220–21.

35. 61 Wash. App. 615, 811 P.2d 697 (1991).

36. *Id.* at 620 (citations omitted).

37. *In re* Guardianship of Lasky, 54 Wash. App. 841, 854, 776 P.2d 695 (1989); Miller v. Badgley, 51 Wash. App. 285, 302, 753 P.2d 530 (1988).

38. *Miller*, 51 Wash. App. at 299–300. *See also* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985) (noting that an attorney's subjective good faith no longer provides the safe harbor that it once did).

39. 70 Wash. App. 827, 855 P.2d 1200 (1993).

40. *Id.* at 834.

41. *Id.* at 835.

42. *Id.*

for the attorney's violations of CR 11.[43] *Suarez*'s significance should not be overlooked: the case permits the imposition of sanctions for an attorney's ill-motivated actions without regard to the three conditions enunciated in *Miller*.

Also instructive is *Skilcraft Fiberglass, Inc. v. Boeing Co*.,[44] in which a supplier obtained, without notice, a default judgment against the primary contractor and the owner of the property where the construction project had taken place.[45] The contractor and the property owner filed a motion to vacate the default judgment and to impose sanctions against the supplier. The trial court granted the motion after concluding that the supplier's attorney had obtained the default judgment against the property owner improperly because the contractor's bond had released the lien on the property.[46] The court also concluded that the supplier's attorney failed to serve the default motion on the contractor and the property owner, even though they were entitled to notice of the default proceedings.[47] The court awarded sanctions based on the attorney's breach of his duty to conduct a reasonable inquiry into the law and the facts and his duty not to interpose the motion for purposes of delay or harassment or to increase the costs of litigation.[48] The court of appeals affirmed the sanctions award after concluding that the attorney's actions were interposed for an improper purpose.[49] As both *Suarez* and *Skilcraft* confirm, the "improper purpose" element is a separate and independent justification for an award of sanctions under CR 11.[50]

C. Courts May Impose Sanctions Against an Attorney, a Party, or Both

If CR 11 is violated, a court may impose sanctions against the offending attorney, a party, or both.[51] As the *Cascade Brigade* court succinctly stated, "Starting a lawsuit is no trifling thing. By the simple act

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43. *Id.* The court also determined the attorney failed to satisfy his duty to make a reasonable pre-filing inquiry by relying solely on the clerk's opinion when filing one of his affidavits of prejudice. *Id*. at 834.

44. 72 Wash. App. 40, 863 P.2d 573 (1993), *abrogated on other grounds by* Morin v. Burris, 160 Wash. 2d 745, 756–57, 161 P.3d 956 (2007).

45. *Id.* at 43.

46. *Id.*

47. *Id.* at 44.

48. *Id.* at 44 n.1.

49. *Id.* at 47–48.

50. *See* Harrington v. Pailthorp, 67 Wash. App. 901, 912–13, 841 P.2d 1258 (1992).

51. The issue of whether sanctions should be imposed against the attorney, the client, or both is troublesome. CR 11 governs the conduct of an attorney in signing pleadings. The determination of whether to file a lawsuit or submit a pleading is a practical decision that rests with the attorney. When the attorney has reservations about submitting a pleading, a discussion with the client about the meaning of CR 11 is essential.

of signing a pleading, an attorney sets in motion a chain of events that surely will hurt someone. Because of CR 11, that someone may be the attorney."[52] Indeed, while CR 11 allows the imposition of penalties against both a party and the party's attorney, the attorney usually bears the burden for violating the rule given the attorney's heightened duty to the court. The rule applies, however, with equal force to pro se parties.[53]

In 1993, the Washington Supreme Court rejected the idea that sanctions are mandatory by deleting the word "shall" from the language of the rule in favor of the more permissive "may."[54] Although the courts have substantial discretion when considering the imposition of sanctions under CR 11,[55] some courts nevertheless continue to mistakenly assume sanctions are mandatory.[56]

A court may look to the purpose behind CR 11 to determine whether to exercise its discretion under the circumstances and impose sanctions. For example, in *Cascade Brigade*, the court of appeals upheld the trial court's imposition of sanctions after finding that an attorney representing Cascade Brigade had filed suit without "one fact to support [his] position," and had "no basis in law for" the suit.[57] The court held that the applicable law governing the suit was straight-forward and discoverable with minimal research, that the attorney failed to produce any facts to support the suit, and that the attorney had learned of relevant contracts but never obtained or read them before starting the lawsuit.[58] In making this determination, the court focused on the policy behind CR 11, which is to reduce the number of baseless lawsuits, and noted that the attorney's "action in filing suit and moving for summary judgment without facts typifies the shoot-first-and-ask-questions-later approach to the practice of law, an approach that CR 11 was intended to inhibit."[59] Under these circumstances, the court determined that the trial court appropriately exercised its discretion to impose sanctions.

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52. Cascade Brigade v. Econ. Dev. Bd. For Tacoma-Pierce County, 61 Wash. App. 615, 617, 811 P.2d 697 (1991).

53. *Harrington*, 67 Wash. App. at 910. *See also* Brian L. Holtzclaw, *Pro Se Litigants: Application of a Single Objective Standard under FRCP 11 to Reduce Frivolous Litigation*, 16 U. PUGET SOUND L. REV. 1371, 1371–72 (1993).

54. Amendment to WASH. SUP. CT. CIV. R. 11, 122 Wash. 2d 1102 (1993). *See also* Rudolph v. Empirical Research Sys., Inc., 107 Wash. App. 861, 866, 28 P.3d 813 (2001) (noting that the Washington Supreme Court's use of "shall" in a court rule creates a mandatory duty while "may" is permissive and discretionary).

55. Miller v. Badgley, 51 Wash. App. 285, 303, 753 P.2d 530 (1988).

56. *See, e.g.*, Johnson v. Jones, 91 Wash. App. 127, 135, 955 P.2d 826 (1998).

57. 61 Wash. App. at 619–20.

58. *Id.* at 623–24.

59. *Id.* at 624. The court declined to use the word "frivolous" to describe the lawsuits that CR 11 is designed to discourage because the word is not contained in the rule. *Id.* at 626 n.8.

Given that the primary goal of CR 11 is to rid the courts of baseless litigation and to reduce the growing costs of litigation, it is unsurprising that courts almost always impose sanctions upon the attorney rather than on the attorney's client. "About half of the practice of a decent lawyer is telling would be clients that they are damned fools and should stop."[60] The *Watson* court held that sanctions were properly imposed on an attorney who brought suit against a physician without "a shred of evidence" that the physician was even present during the allegedly negligent surgery.[61] The court rejected the attorney's argument that penalties should not be imposed on him because he was following a consulting firm's advice in joining the physician, noting that CR 11 requires an attorney to make an objectively reasonable inquiry into the facts supporting his case before filing a lawsuit.[62] Blind reliance on the consulting firm's advice, the court held, did not begin to satisfy the attorney's CR 11 obligations.[63] Nor can an attorney rely on merely the client's assurances that facts exist when a reasonable inquiry would reveal otherwise.[64]

In addition to investigating the client's version of the facts, an attorney must investigate the legal validity of all claims asserted. In *Madden v. Foley*,[65] the trial court imposed CR 11 sanctions on the plaintiff, the plaintiff's attorney, and the attorney's law firm after determining that nearly all of the plaintiff's claims were grounded in alienation of affection, a cause of action that no longer existed in Washington.[66] The only challenge on appeal was to the imposition of sanctions against the attorney and the firm; the court of appeals upheld the imposition of sanctions against both.[67] The court held that the attorney failed to conduct a reasonable investigation into whether the complaint had a proper foundation in law and fact and that the allegations indeed amounted to nothing more than a claim for alienation of affection.[68] The court also upheld sanctions against the law firm because the attorney signed the pleadings as an agent of the firm.[69] The court observed that the policies underlying CR 11 are best served when the rule is interpreted broadly, enabling a court

60. Watson v. Maier, 64 Wash. App. 889, 891, 827 P.2d 311 (1992) (quoting Elihu Root, the United States Secretary of State from 1905–1909, *quoted in* McCandless v. Great Atlantic & Pac. Tea Co., 697 F.2d 198, 201–02 (7th Cir. 1983)).

61. *Id.* at 897.

62. *Id.*

63. *Id.*

64. *Id.*

65. 83 Wash. App. 385, 922 P.2d 1364 (1996).

66. *Id.* at 388.

67. *Id.* at 393.

68. *Id.* at 390–91.

69. *Id.* at 392.

to fashion a penalty that deters litigation abuses efficiently and effectively.[70]

In *In re Cooke*,[71] on the other hand, the court of appeals upheld the imposition of sanctions against the plaintiff rather than the plaintiff's attorney because the plaintiff used his attorney's pleading papers.[72] Notably, the plaintiff signed the filing, not the attorney.[73]

D. Determining the Appropriate Sanction

Washington courts retain broad discretion to tailor an appropriate sanction and to determine against whom such a sanction should be imposed.[74] Appellate courts will review the sanctions imposed under CR 11 for an abuse of discretion, both as to the trial court's decision to impose sanctions and to the nature of the sanctions imposed.[75]

Although the courts are ready and willing to impose sanctions under CR 11 and its counterparts,[76] "the least severe sanctions adequate to serve the purpose should be imposed."[77] In some instances, nonmonetary sanctions such as a reprimand may be sufficient.[78] Notably, CR 11 sanctions are not designed to be another fee-shifting mechanism.[79] When the trial court awards attorney fees as a sanction, it must limit those fees to the amounts reasonably expended in responding to the improper pleadings.[80] Furthermore, "[a] party resisting a motion that violates CR 11 has a duty to mitigate and may not recover excessive expenditures."[81]

The Washington Supreme Court's treatment of sanctions in *Biggs v. Vail* is particularly instructive with respect to the complexities that may arise in CR 11 cases.[82] *Biggs* began as a dispute over who should receive certain attorney fees earned by Patrick Biggs while employed as an at-

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70. *Id.*

71. 93 Wash. App. 526, 969 P.2d 127 (1999).

72. *Id.* at 527–28, 530.

73. *Id.*

74. Miller v. Badgley, 51 Wash. App. 285, 303, 753 P.2d 530 (1988).

75. State *ex rel.* Quick-Ruben v. Verharen, 136 Wash. 2d 888, 903, 969 P.2d 64 (1998) (applying abuse of discretion standard to the decision to award fees); Reid v. Dalton, 124 Wash. App. 113, 125, 100 P.3d 349 (2004) (applying abuse of discretion standard to determine whether the amount of fees was appropriate).

76. *In re* Guardianship of Lasky, 54 Wash. App. 841, 854–56, 776 P.2d 695 (1989).

77. Bryant v. Joseph Tree, 119 Wash. 2d 210, 225, 829 P.2d 1099 (1992).

78. *Miller*, 51 Wash. App. at 303.

79. *Bryant*, 19 Wash. 2d at 220.

80. MacDonald v. Korum Ford, 80 Wash. App. 877, 891, 912 P.2d 1052 (1996).

81. *Miller*, 51 Wash. App. at 303.

82. Biggs v. Vail (*Biggs I*), 119 Wash. 2d 129, 830 P.2d 350 (1992); Biggs v. Vail (Biggs II), 124 Wash. 2d 193, 876 P.2d 448 (1994).

torney by David Vail.[83] Biggs sued Vail, alleging a myriad of claims, including breach of contract.[84] The trial court found in favor of Vail on the breach of contract claim and determined that Biggs's other claims were frivolous. The court awarded Vail $25,000 in attorney fees.[85] The court of appeals affirmed the judgment and awarded fees for a frivolous appeal. The Washington Supreme Court reversed the fee award.[86]

After the mandate was issued, Vail filed a motion in the trial court for sanctions under CR 11.[87] The trial court granted the motion and awarded sanctions. But it did not specify the conduct meriting the sanction and failed to explain the basis for reducing Vail's claim.[88] The Washington Supreme Court reversed and remanded a second time, noting that the trial court failed to exercise its discretion when awarding the same amount of sanctions previously disallowed without further inquiry.[89] Importantly, the court cautioned that reinstating the previous sanction a second time "regardless of its findings, would be presumptively unreasonable and an abuse of discretion."[90] The court concluded that a nonmonetary sanction was appropriate because Biggs was no longer practicing law.[91] In the court's view, his exit from the profession was enough to deter any future abuse.[92]

E. Federal Law Provides Additional Guidance to Determine Appropriate Sanctions

CR 11 shares many similarities with Rule 11.[93] When the language of a Washington rule and its federal counterpart are the same, courts look

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83. *Biggs I*, 119 Wash. 2d at 131.
84. *Id.*
85. *Id.* at 132.
86. *Id.*
87. *Biggs II*, 124 Wash. 2d at 196.
88. *Id.*
89. *Id.* at 202.
90. *Id.* at 202 n.3.
91. *Id.*
92. *Id.*
93. FED. R. CIV. P. 11 provides in part:

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record . . . or by a party personally if the party is unrepresented . . . .

(b) Representations to the Court. By presenting . . . a pleading, written motion, or other paper . . . 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

to decisions interpreting the federal rule for guidance.[94] The federal rule reinforces the duty of candor by subjecting litigants who persist in litigation after it is no longer tenable to potential sanctions.[95] Litigants in federal court may avoid the imposition of sanctions if they withdraw or correct contentions after a potential violation is called to their attention.[96] The imposition of a Rule 11 sanction constitutes a determination that an attorney has abused the judicial process rather than a judgment on the merits of an action.[97] As with the state rule, federal courts look askance at the use of Rule 11 as a combative tool because the rules governing the ethical conduct of lawyers are too important to be trivialized and to be used in baseless mud-slinging.[98]

Again mirroring the state rule, Rule 11 should not serve as a fee shifting mechanism to compensate the prevailing party; instead, courts must aim to deter and punish improper conduct.[99] Courts must apply the rule so as to give effect to its principal goal of deterrence.[100] Notwithstanding its central purpose to deter vexatious litigation, the rule should not be construed as a bar to litigation; allegations need not be perfect

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

94. *See, e.g.*, Am. Disc. Corp. v. Saratoga W., Inc., 81 Wash. 2d 34, 37–38, 499 P.2d 869 (1972). *See also* Bryant v. Joseph Tree, 119 Wash. 2d 210, 221, 829 P.2d 1099 (1992) (construing CR 11 in light of FRCP 11 because the state rule is modeled after and is substantially similar to the federal rule).

95. Young v. Corbin, 889 F. Supp. 582, 585 (N.D.N.Y. 1995).

96. *Id.*

97. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396 (1990).

98. Autrey v. United States, 889 F.2d 973, 986, *reh'g denied* 897 F.2d 537 (11th Cir. 1989).

99. United States *ex rel*. Leno v. Summit Constr. Co., 892 F.2d 788, 791 n.4 (9th Cir. 1989).

100. *Cooter & Gell*, 496 U.S. at 393.

from the outset to avoid sanctions under the rule.[101] Rule 11 allows attorneys to make claims as long as the allegations contained in them are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. However, the rule does not give litigants general license to plead their claim first and investigate later.[102] As with CR 11, the party who signs documents must conduct an inquiry into the facts and law in order to be satisfied that document is well grounded.[103] Under the federal rule, litigants are not free to sign frivolous or vexatious documents with impunity.[104]

III. RCW 4.84.185

CR 11's goal of deterring vexatious litigation is reinforced by RCW 4.84.185.[105] In enacting the statute,[106] the legislature expressed concern about the baseless claims and defenses confronting the courts.[107] It designed the statute to discourage frivolous lawsuits and to compensate victims forced to litigate meritless cases.[108] Unlike CR 11, the action must be frivolous in its entirety for the statute to apply.[109] If any claim has merit, then the action is not frivolous under RCW 4.84.185.[110] While the concept of "frivolity" may be amorphous, it is neither vague nor unconstitutional.[111] By contrast, CR 11 may apply to a single issue.[112]

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101. Foster v. Michelin Tire Corp., 108 F.R.D. 412, 415 (C.D. Ill. 1985).

102. Geisinger Med. Ctr. v. Gough, 160 F.R.D. 467, 469 (M.D. Pa. 1994).

103. Bus. Guides, Inc. v. Chromatic Comm'ns Enters., Inc., 498 U.S. 533, 543–44 (1991).

104. *Id.*

105. Despite being created by different entities, WASH. SUP. CT. CIV. R. 11 and WASH. REV. CODE § 4.84.185 (2006) are virtually interchangeable.

106. WASH. REV. CODE § 4.84.185 (2006) states, in pertinent part:

> In any civil action, the court . . . may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action . . . This determination shall be made upon motion by the prevailing party after a[n] . . . order of dismissal, order on summary judgment, final judgment after trial or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

107. Biggs v. Vail (*Biggs I*), 119 Wash. 2d 129, 134–37 (1992) (reviewing and interpreting the legislative history of WASH. REV. CODE § 4.84.185 (1991)).

108. *Id.* at 137.

109. State *ex rel.* Quick-Ruben v. Verharen, 136 Wash. 2d 888, 903–04, 969 P.2d 64 (1998); *Biggs I*, 119 Wash. 2d at 136; Jeckle v. Crotty, 120 Wash. App. 374, 85 P.3d 931 (2004).

110. *In re* Cooke, 93 Wash. App. 526, 530, 969 P.2d 127 (1999). *See also Biggs I*, 119 Wash. 2d at 137 (finding that although three of four claims were frivolous, the action *as a whole* could not be deemed frivolous).

111. Rhinehart v. Seattle Times, Inc., 59 Wash. App. 332, 340, 798 P.2d 1155 (1990).

112. *In re* MacGibbon, 139 Wash. App. 496, 499, 161 P.3d 441 (2007).

The substantive standard for a frivolous action under the statute largely mirrors the standard articulated in CR 11.[113] But unlike most CR 11 sanctions, the client, not the attorney, pays the sanctions imposed under RCW 4.84.185.[114] If the issue in the case is "debatable" and there is a rational argument under the law and the facts to support it, fees must be denied.[115] Similarly, issues of first impression are not frivolous.[116] The decision whether to award attorney fees for a frivolous lawsuit is within the trial court's discretion and will not be disturbed absent a clear showing of abuse.[117]

RCW 4.84.185 also has a parallel in federal law: 28 U.S.C. § 1927. While not directly analogous, 28 U.S.C. § 1927 is also intended to deter attorneys or other persons from unreasonably and vexatiously multiplying or extending the proceedings in a case by awarding costs, expenses, and attorney fees against them.[118] An attorney's harassing or annoying conduct need not be intentional or consciously improper for a court to impose sanctions; it is enough that the attorney displays a serious and studied disregard for the orderly administration of justice.[119] Inartful pleading and ignorance of legal requirements do not amount to an intentional abuse of the judicial process because an untenable claim is not improper conduct. Instead, evidence of recklessness, improper motive, or bad faith must be present.[120] As with CR 11, federal courts apply an objective standard when determining whether to impose sanctions.[121]

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113. *See* Harrington v. Pailthorp, 67 Wash. App. 901, 911–13, 841 P.2d 1258 (1992) (analyzing claims under both the civil rule and the statute).

114. *Biggs I*, 119 Wash. 2d at 137; Skimming v. Boxer, 119 Wash. App. 748, 756, 82 P.3d 707 (2004); Watson v. Maier, 64 Wash. App. 889, 896, 827 P.2d 311 (1992).

115. Bill of Rights Legal Found. v. Evergreen State Coll., 44 Wash. App. 690, 696–97, 723 P.2d 483 (1986).

116. Collinson v. John L. Scott, Inc., 55 Wash. App. 481, 488, 778 P.2d 534 (1989) (holding that a claim of obstruction of view as nuisance not frivolous as one of first impression). Nor can issues of substantial public importance be said to be frivolous. Moorman v. Walker, 54 Wash. App. 461, 465–66, 773 P.2d 887 (1989) (holding that a claim of mother's misrepresentation of inability to conceive to be novel and of substantial public importance, thus not frivolous).

117. Fluke Capital & Mgmt. Servs. Co. v. Richmond, 106 Wash. 2d 614, 625, 724 P.2d 356 (1986).

118. 28 U.S.C. § 1927 (1980) states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

119. Obert v. Republic W. Ins. Co., 264 F. Supp. 2d 106, 124 (D.R.I. 2003) (internal citations omitted).

120. Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La., Inc., 38 F.3d 1414, 1416–17 (5th Cir. 1994); Murray v. Playmaker Servs., LLC, 548 F. Supp. 2d 1378, 1382 (S.D. Fla. 2008), *aff'd*, No. 08-12908, 2009 WL 1291769 (11th Cir. May 8, 2009); Gianna Enters. v. Miss World (Jersey) Ltd., 551 F. Supp. 1348, 1360 (S.D.N.Y. 1982).

121. Amalong & Amalong, P.A. v. Denny's Inc., 500 F.3d 1230, 1239–40 (11th Cir. 2007).

Because of the potential for abuse, federal courts[122] construe the statute narrowly and with great caution.[123] Federal courts utilize the statute only where there is evidence of serious disregard for the orderly administration of justice.[124] A court may impose sanctions under § 1927 on its own volition and at its own discretion.[125] The statute permits a court to require an attorney to personally pay costs incurred due to his or her unreasonable and vexatious multiplication of legal proceedings.[126] Costs assessed under the statute are limited to those excess costs arising out of the attorney's vexatious behavior and subsequent complication or extension of the legal proceedings and may not amount to the total costs of litigation.[127] The relative wealth of the parties may be considered in determining the sanction imposed.[128]

Despite the apparent similarity of § 1927 to Rule 11, the two rules have significant substantive and procedural differences and cannot be imposed as an alternative to one another.[129] Section 1927 is broader in scope than Rule 11. It is not triggered by the mere filing of frivolous claims; instead, it imposes a continuing restraint upon an attorney's conduct throughout the course of the proceedings.[130] A court may find cause to impose sanctions under Rule 11 while finding no cause to impose sanction under § 1927.[131]

IV. FRIVOLOUS APPEALS

Washington appellate courts have awarded fees on appeal to parties who have abused the appellate rules or have filed frivolous appeals.[132]

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122. The federal statute is not limited to district courts; courts of appeals may likewise impose sanctions on an attorney for his or her unreasonable and vexatious conduct. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 638 (9th Cir. 1987).

123. Mone v. Comm'r, 774 F.2d 570, 574 (2nd Cir. 1985).

124. Dreiling v. Peugeot Motors of Am., Inc., 768 F.2d 1159, 1165 (10th Cir. 1985).

125. Jolly Group, Ltd. v. Medline Indus., Inc., 435 F.3d 717, 720 (7th Cir. 2006).

126. United States v. Ross, 535 F.2d 346, 349 (6th Cir. 1976).

127. Rogers v. Kroger Co., 586 F. Supp. 597, 602 (S.D. Tex. 1984).

128. *Id.* at 603.

129. Hutchinson v. Pfeil, 208 F.3d 1180, 1186–87 (10th Cir. 2000).

130. *See In re* Sowers, 97 B.R. 480, 484 (N.D. Ind. 1989).

131. *In re* Schaefer Salt Recovery, Inc., 542 F.3d 90, 101 (3rd Cir. 2008).

132. WASH. R. APP. P. 18.9(a) states:

> The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

See also WASH. R. APP. P. 18.7; WASH. R. APP. P. 18.9(a). *See generally* WASHINGTON STATE BAR ASSOCIATION, APPELLATE PRACTICE DESKBOOK, § 26.3 (Wash. State Bar Assoc. 3d ed. 2005); Philip A. Talmadge, *Toward a Reduction of Washington Appellate Court Caseloads and More Effective Use of Appellate Court Resources*, 21 GONZ. L. REV. 21, 34–37 (1985).

No cases discuss the particular method used to determine such fees under RAP 18.9(a); in practice, however, appellate court commissioners use the lodestar method.[133]

In determining whether an appeal is frivolous, the courts have been guided since at least 1980 by the following considerations:

> (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.[134]

More specifically, an appeal is frivolous if it is essentially factual rather than legal in nature, if it involves discretionary rulings and the trial court did not abuse its discretion, or if the appellant cannot cite any authority to support his or her position.[135] An appeal is not frivolous simply because the appellant's arguments were rejected.[136] Similarly, an appeal is not frivolous if it involves an issue of first impression.[137] A respondent may recover his or her fees on appeal from the party filing a frivolous appeal.[138]

RAP 18.9(a) and RAP 18.7 both govern the imposition of sanctions on appeal. RAP 18.9(a) permits an appellate court to impose sanctions where a party uses the rules to delay or for an improper purpose. RAP 18.7 specifically incorporates the provisions of CR 11, which suggests that a single frivolous appellate issue may be sanctionable.[139] An appel-

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133. Case law on this subject is largely confined to unpublished opinions in which the appellate courts, on finding an appeal to be frivolous, have directed a court commissioner to determine the amount of the award. *But see* Lynn v. Labor Ready, Inc., 136 Wash. App. 295, 314, 151 P.3d 201 (2006) (directing the court commissioner to determine reasonable attorney fees as a sanction under RAP 18.9(a) for making substantive misrepresentations to the court in a published decision).

134. Streater v. White, 26 Wash. App. 430, 435, 613 P.2d 187 (1980).

135. *See, e.g.*, Johnson v. Jones, 91 Wash. App. 127, 137–138, 955 P.2d 826 (1998) (finding no reasonable basis to argue the trial court abused its discretion); Clarke v. Equinox Holdings, Ltd., 56 Wash. App. 125, 133, 783 P.2d 82 (1989) (finding an action to be frivolous where appellant failed to support his constitutional challenge with argument or authority, and his other claims were completely devoid of merit); Sherwood v. Bellevue Dodge, Inc., 35 Wash. App. 741, 750, 669 P.2d 1258 (1983) (declining to award sanctions where the appeal was not purely factual).

136. *Streater*, 26 Wash. App. at 435.

137. Olson v. City of Bellevue, 93 Wash. App. 154, 165–66, 968 P.2d 894 (1998); Cary v. Allstate Ins. Co., 78 Wash. App. 434, 440–41, 897 P.2d 409 (1995), *aff'd*, 130 Wash. 2d 335, 922 P.2d 1335 (1996).

138. Millers Cas. Ins. Co. v. Biggs, 100 Wash. 2d 9, 15, 665 P.2d 887 (1983); Boyles v. Dep't of Ret. Sys., 105 Wash. 2d 499, 506, 716 P.2d 869 (1986).

139. Bryant v. Joseph Tree, 119 Wash. 2d 210, 223, 829 P.2d 1099 (1992) ("RAP 18.7 provides, however, that: '[e]ach paper filed pursuant to [the Rules of Appellate Procedure] should be

late court may also impose sanctions for a party's recalcitrance or obstructionism.[140] A party that files a series of groundless motions and appeals may also face sanctions.[141] A party appealing a trial court's sanction decision may be deemed to be continuing such intransigence and face sanctions on appeal.[142]

A respondent must comply with all of the requirements of RAP 18.1 relating to an award of attorney fees and expenses when requesting the imposition of sanctions against an appellant for the filing of a frivolous appeal.[143] For example, RAP 18.1(b) requires the requesting party to devote a section of his or her opening brief to the request for fees. Moreover, within ten days after a decision awarding the requesting party the right to a reasonable attorney fee is entered, that party must serve and file an affidavit detailing the expenses incurred and the services performed by counsel.[144]

The Federal Rules of Appellate Procedure likewise permit damages to compensate appellees forced to defend against frivolous appeals.[145] Under Federal Rules of Appellate Procedure 38, an appeal is frivolous when it is litigated with no reasonable expectation of altering the district court's judgment and is filed for purposes of delay or harassment or out of sheer obstinacy.[146] Sanctions may be imposed on plaintiffs as well as their attorneys.[147] Appellate Rule 38, to the extent it deals with questions of procedure, is controlling over provisions of state statutes in conflict with the rule.[148] The decision to impose sanctions under Appellate Rule 38 is discretionary.[149]

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dated and signed by an attorney or party as provided in CR 11. . . ."); Layne v. Hyde, 54 Wash. App. 125, 136, 773 P.2d 83 (1989).

140. *In re* Adoption of B.T., 150 Wash. 2d 409, 421, 78 P.3d 634 (2003).

141. Rich v. Starczewski, 29 Wash. App. 244, 247–48, 628 P.2d 831 (1981).

142. Delany v. Canning, 84 Wash. App. 498, 501–02, 929 P.2d 475 (1997).

143. *Cf.* Camer v. Seattle Sch. Dist., 52 Wash. App. 531, 362 n.1, 762 P.2d 356 (1988) (finding *sua sponte* that the appeal was frivolous, but declining to award fees because respondent did not comply with RAP 8.1).

144. WASH. R. APP. P. 18.1(d).

145. Nagle v. Alspach, 8 F.3d 141, 145 (3rd Cir. 1993). If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court with reasonable opportunity to respond, award just damages and single or double costs to the appellee. FED. R. APP. P. 38.

146. Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp., 86 F.3d 96, 101 (7th Cir. 1996).

147. *In re* Cosmopolitan Aviation Corp., 763 F.2d 507, 517 (2d Cir. 1985); Nunley v. Comm'r, 758 F.2d 372, 373 (9th Cir. 1985).

148. *See* Nordmeyer v. Sanzone, 315 F.2d 780, 781–82 (6th Cir. 1963) (holding that the Federal Rules of Civil Procedure trump the state statute that awards damages for delay on affirmance of money judgment).

149. *In re* George, 322 F.3d 586, 591 (9th Cir. 2003).

V. DISCOVERY SANCTIONS

A trend exists in Washington cases, anticipated in *Fisons*, for discovery sanctions to serve as a cottage industry for the trial bar.[150] Parties claiming discovery abuses can re-litigate their cases and recover all fees, even those incurred on seemingly unrelated matters.[151] But the discovery rules are intended to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[152] Washington courts require parties to be candid with one another in discovery.[153] The Washington Supreme Court best articulated this policy in *Fisons*, noting that "a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials."[154]

To enforce the spirit of cooperation underlying the discovery rules, the court may impose sanctions for a party's failure to cooperate. Sanctions for discovery-related misconduct may be imposed in three ways: (1) under CR 26(g), relating to the effect of certification of discovery answers; (2) under CR 37(b), relating to discovery sanctions for violations of court orders or violation of court rules; or (3) under the court's inherent authority.[155]

In cases where sanctions have been imposed, courts have ordinarily required egregious conduct by trial counsel. For example, in *Gammon v. Clark*, the plaintiff's counsel asked the manufacturer of a Bobcat loader that tipped over and killed the plaintiff's husband to produce information during discovery regarding injuries arising out of the use of the same or similar equipment.[156] The manufacturer initially provided five accident reports and produced fifty more following an order to compel production.[157] Once trial began, the manufacturer produced two boxes of additional reports that were revealed in a deposition.[158] The court of appeals

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150. Wash. Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 356, 858 P.2d 1054 (1993).

151. *See, e.g.*, Smith v. Behr Processing Corp., 113 Wash. App. 306, 323–325, 54 P.3d 665 (2002); Mayer v. Sto Indust., Inc. (*Mayer II*), 156 Wash. 2d 677, 692–93, 132 P.3d 115 (2006); Magana v. Hyundai Motor Corp. of Am., 141 Wash. App. 495, 509, 170 P.3d 1165 (2007), *review granted,* 164 Wash. 2d 1020 (2008).

152. Gammon v. Clark Equip. Co., 38 Wash. App. 274, 279–80, 686 P.2d 1102 (1984) (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958)), *aff'd on other grounds*, 104 Wash. 2d 613 (1985).

153. *Id.* at 281–82; Wash. Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 343, 858 P.2d 1054 (1993); Taylor v. Cessna Aircraft Co., 39 Wash. App. 828, 835–36, 696 P.2d 28 (1985).

154. *Fisons*, 122 Wash. 2d at 342.

155. *Id.* at 339–40, 343.

156. *Gammon*, 38 Wash. App. at 277.

157. *Id.* at 277–78.

158. *Id.* at 279.

found a $2,500 sanction against the manufacturer inadequate to ensure that the manufacturer did not profit from its wrong and awarded a new trial.[159]

Similarly, in *Taylor v. Cessna Aircraft Co.*, an aircraft manufacturer concealed the results of testing performed on an aircraft's fuel systems despite subpoenas *duces tecum* requesting that information and an order directing it to comply with the subpoena.[160] Nonetheless, the trial court found the manufacturer's conduct reasonable and refused to grant the plaintiffs' second motion for a new trial.[161] The court of appeals disagreed, noting that it was not for the manufacturer to unilaterally decide what was relevant during discovery.[162] The court granted the plaintiffs a new trial based on the manufacturer's misconduct.[163]

In *Fisons*, the Washington Supreme Court upheld sanctions against a pharmaceutical company that deliberately withheld two "smoking gun" letters from an injured plaintiff and her doctor.[164] The letters revealed that the company had warned other selected physicians of the precise hazards of the drug that had caused the plaintiff's injuries.[165] The court stated that an attorney's CR 26(g) discovery responses certification must be evaluated under an objective standard to assess if the attorney's actions were reasonable:

> In determining whether an attorney has complied with the rule, the court should consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request.[166]

In finding the drug company's conduct sanctionable, the court noted the company's actions were "misleading,"[167] and it "was persistent in its resistance to discovery requests."[168]

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159. *Id.* at 282.

160. 39 Wash. App. 828, 834–35, 696 P.2d 28 (1985).

161. *Id.* at 833, 835.

162. *Id.* at 836.

163. *Id.* at 838.

164. Wash. Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 336, 858 P.2d 1054 (1993). The doctor and the plaintiff settled long before the documents were finally revealed in the course of the case between the physician and the company. *Id.* at 307–08.

165. *Id.* at 307–08.

166. *Id.* at 343.

167. *Id.* at 352.

168. *Id.* at 346. *See generally* Brian J. Beck, *Rediscovering Discovery: Washington State Physicians Insurance Exchange and Association v. Fisons Corporation*, 18 SEATTLE U. L. REV. 129 (1994); Barbara J. Gorham, *Fisons*: *Will it Tame the Beast of Discovery Abuse?*, 69 WASH. L. REV. 765 (1994); Bryan P. Harnetiaux et al., *Harnessing Adversariness in Discovery Responses: A Proposal for Measuring the Duty to Disclose After Physicians Insurance Exchange and Ass'n v. Fisons*

In general, the sanction imposed for discovery abuse should be the least severe sanction available to adequately deter, punish, compensate, educate, and to ensure that the wrongdoer does not profit from the wrong.[169] Due process issues may arise, especially where a party is deprived of his or her day in court due to the misconduct of the party's counsel during discovery. The court's decision in *Smith v. Behr Processing Corporation* is instructive. In *Smith*, the trial court imposed sanctions against Behr Processing for violating an order requiring witness disclosure.[170] In particular, Behr failed to disclose the opinions of certain experts and to deliver product tests revealing defects in its product.[171] After an extensive evidentiary hearing on the violation, the trial court made the requisite findings and ordered a default judgment pursuant to CR 55.[172] The court of appeals affirmed, finding the sanction did not violate Behr's right to due process.[173]

A trial court must make a record of its sanctions decision, which an appellate court will ordinarily review for an abuse of discretion.[174] In *Burnet v. Spokane Ambulance*,[175] the Washington Supreme Court outlined several factors to be considered when determining whether a trial court adequately considered lesser sanctions (*e.g.*, excluding evidence or testimony, dismissing the case, or entering an order of default) when severely sanctioning a party. *Rivers v. Washington State Conference of Mason Contractors*[176] synthesized these factors into a three-part test:

> When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a discovery order, it must be apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed.[177]

The *Burnet* court reversed the trial court's harsh sanction because it failed to consider lesser sanctions,[178] while the *Rivers* court remanded the

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Corporation, 29 GONZ. L. REV. 499 (1994). *See also In re* Firestorm, 129 Wash. 2d 130, 139, 916 P.2d 411 (1996) (finding that an attorney had ex parte contact with witness, but declining to impose disqualification of counsel as a sanction).

169. *Fisons*, 122 Wash. 2d at 356.

170. Smith v. Behr Processing Corp., 113 Wash. App. 306, 315, 54 P.3d 665 (2002).

171. *Id.* at 315–16.

172. *Id.* at 316.

173. *Id.* at 330–31.

174. *Fisons*, 122 Wash. 2d at 339, 355.

175. 131 Wash. 2d 484, 494, 933 P.2d 1036 (1997).

176. 145 Wash. 2d 674, 41 P.3d 1175 (2002).

177. *Id.* at 686–87.

178. 131 Wash. 2d at 499.

case and required the trial court to make specific findings on the record related to all three parts of the test.[179]

More recently, the Washington Supreme Court appeared to underscore in the strongest way the imperative of forthrightness and cooperation during discovery.[180] The court upheld an $8,000,000 default judgment against a manufacturer for what it described as the manufacturer's "atrocious behavior in failing to respond to discovery requests throughout the lawsuit." [181] Declaring that trial courts "need not tolerate deliberate and willful discovery abuse," the court held the trial court had properly applied the *Burnet* factors in imposing one of the "harsher remedies" under CR 37(b).[182] Noting that Hyundai is a sophisticated multinational corporation, experienced in litigation, the court held that the company had willfully, deliberately, and continually failed to comply with Magaña's discovery requests.[183] It further held that Hyundai's "egregious actions" during discovery prejudiced Magaña's ability to prepare for trial.[184] The court upheld the trial court's finding that a monetary fine would not suffice as it was difficult to know what amount would be suitable to impose against a multi-billion dollar corporation.[185] It also upheld the trial court's decision not to grant a continuance so as not to reward the party who had committed the discovery violations.[186] While the court's upholding of such an extraordinarily severe discovery sanction may raise questions about due process, it should put practitioners on notice that the court will not take lightly its admonition in *Fisons* to engage forthrightly in the discovery process. It should certainly give any attorney pause who might otherwise contemplate shielding discoverable material from opposing counsel. The cost of doing so could prove fatal to one's case.

In *Mayer v. Sto Industries, Inc.*,[187] the court of appeals held that when a trial court imposes substantial monetary sanctions against a party for discovery-related violations, the trial court must comply with *Burnet* and *Rivers*.[188] There, the court of appeals ordered a new trial after Sto

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179. 145 Wash. 2d at 700.

180 *Magaña v. Hyundai Motor America*, ___ P.3d ___ 2009.

181 *Id.* at ¶¶ 1, 43.

182 *Id.* at ¶ 24.

183 The Supreme Court also held that Hyundai wrongly restricted its search for records to the company's legal department. *Id.* at ¶ 28.

184 *Id.* at ¶¶ 38, 46.

185 *Id.* at ¶ 44.

186 *Id.*

187. 123 Wash. App. 443, 448, 98 P.3d 116 (2004), *rev'd*, 156 Wash. 2d 677, 132 P.3d 115 (2006).

188. *Id.* at 454–55.

failed to disclose a document in discovery but gave the plaintiffs access to a corporate document repository.[189] In the second trial, the trial court imposed the attorney fees and expenses that the plaintiffs incurred in the first trial as a discovery sanction without specifying the rule or other basis for the sanction.[190] The court of appeals remanded, holding that the lodestar multiplier may be applied only to fees after the contingent fee is effective, not to the entire fee award.[191] The Washington Supreme Court reversed the court of appeals, however, holding that the *Burnet-Rivers* protocol was inapplicable in the context of a compensatory award under CR 26 because those factors applied to the harsher remedies such as dismissal, default, and exclusion of testimony allowable under CR 37(b).[192] The reluctance to employ the lodestar method when calculating attorney fees as a sanction is problematic, and will be discussed in Part VI, *infra*.

The Washington discovery rules have their counterparts in Federal Rules of Civil Procedure 26(g) and 37. Under those rules, a court may direct a party to pay the opposing party's reasonable attorney fees and costs where the opposing party is forced to expend unnecessary time and expense due to the offending party's failure to respond to discovery requests.[193] Similarly, a court may require a party to pay reasonable expenses and fees incurred due to bad faith claims regarding discovery materials.[194] An attorney must make a reasonable inquiry before certifying discovery documents are complete or correct, or the attorney risks the imposition of discovery sanctions under Federal Rule of Civil Procedure 26.[195]

Attorneys and clients alike may be held responsible for fees and costs imposed as a sanction for discovery abuse.[196] Furthermore, an attorney may be held personally liable for failing to comply with discovery

189. *Id.* at 453.

190. *Id.* at 455.

191. *Id.* at 461.

192. Mayer v. Sto Indus., Inc. (*Mayer II*), 156 Wash. 2d 677, 689–90, 132 P.3d 115 (2006). Nonetheless, the court affirmed the trial court's award of interest on costs from the first trial as part of the sanctions awarded against the defendant. In doing so, the court appears to have given trial courts approval to award costs beyond those typically allowed under the lodestar method. While never discussing the lodestar method explicitly, the court cited to *Roberson v. Perez*, 123 Wash. App. 320, 346-47, 96 P.3d 420 (2004), where the court of appeals upheld the trial court's award of travel time (which is generally not allowable when calculating a reasonable attorney fee) as compensable when attorney fees were awarded as a sanction. *Mayer*, 156 Wash. 2d at 692.

193. *See* Wachtel v. Guardian Life Ins. Co., 239 F.R.D. 376, 385–87 (D.N.J. 2006).

194. *In re* ULLICO Inc. Litig., 237 F.R.D. 314, 318–19 (D.D.C. 2006).

195. Rottlund Co. v. Pinnacle Corp., 222 F.R.D. 362, 386–87 (D. Minn. 2004).

196. *See* Hyde & Drath v. Baker, 24 F.3d 1162, 1172 (9th Cir. 1994).

orders under Federal Rule of Civil Procedure 37.[197] Sanctions against counsel are a more appropriate remedy than dismissal of the client's action where discovery violations are the result of counsel's neglect.[198] Sanctions may, however, be imposed against a client rather than the attorney where it is unclear that it was the attorney, rather than the client, who instigated the discovery violation.[199]

A court must provide notice and an opportunity to be heard on the record before imposing sanction of attorney fees for discovery violations.[200]

In determining the amount of attorney fees and costs to award as a discovery sanction, the court may consider, *inter alia*: the skill and experience of the attorney; the novelty and difficulty of the legal questions involved, and the skill required in addressing them; and the preclusion of other employment.[201] The court may also consider the length of time an attorney has been in practice and the attorney's relative experience in a given field of practice.[202]

VI. THE APPROPRIATE RULE FOR CALCULATING ATTORNEY FEES AS SANCTIONS

Because the lodestar method is the default principle for calculating reasonable fees in Washington, a court that chooses to award attorney fees as a sanction should calculate the fee using that method.[203] Uniform application of the lodestar method will (1) ensure an objective standard of reasonableness; (2) discourage attorneys from abusing sanctions motions; and (3) ensure that the trial courts establish sound support for the imposition of sanctions pursuant to the purposes underlying the rules.

The Washington Supreme Court summarized the rules relating to the calculation of a reasonable attorney fee in *Mahler v. Szucs*:[204]

> Under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. Necessarily, this decision requires the court to exclude from the requested hours any wasteful or dup-

197. Shipes v. Trinity Indus., 987 F.2d 311, 323–24 (5th Cir. 1993). *See also* Sun v. Bd. of Trustees of Univ. of Ill., 229 F.R.D. 584, 591–93 (C.D. Ill. 2005), *aff'd*, 473 F.3d 799 (7th Cir. 2007).

198. Butler v. Pearson, 636 F.2d 526, 531 (C.A.D.C. 1980).

199. Humphreys Exterminating Co. v. Poulter, 62 F.R.D. 392, 395 (D. Md. 1974).

200. Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 784 (9th Cir. 1983).

201. Bryant v. City of Marianna, Fla., 532 F. Supp. 133, 137–38 (N.D. Fla. 1982).

202. E.E.O.C. v. Accurate Mech. Contractors, Inc., 863 F. Supp. 828, 834 (E.D. Wis. 1994).

203. *See* Roberson v. Perez, 123 Wash. App. 320, 344–45, 96 P.3d 420 (2004) (explaining that the lodestar calculation was not required where a fee award was reasonable).

204. 135 Wash. 2d 398, 957 P.2d 632 (1998).

> licative hours and any hours pertaining to unsuccessful theories or claims. Counsel must provide contemporaneous records of documenting the hours worked . . . . [S]uch documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (*i.e.*, senior partner, associate, etc.).
>
> The court must also determine the reasonableness of the hourly rate of counsel at the time the lawyer actually billed the client for services.
>
> Finally, the lodestar fee, calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result, may, in rare instances, be adjusted upward or downward in the trial court's discretion.[205]

Although Washington courts generally recognize the lodestar method as the default principle for calculating a reasonable attorney fee, Washington courts have on occasion determined the lodestar method does not or may not apply.[206]

Until the Washington Supreme Court's *Mahler* decision, most observers assumed that the lodestar methodology applied to calculate the fee imposed as a sanction for discovery misconduct, particularly because federal courts employed the same method.[207] Presumptively, that same method would govern the calculation of a reasonable fee under CR 11 or RCW 4.84.185.[208] However, in *Highland School District No. 203 v. Racy*,[209] the court of appeals declined to apply the lodestar method to calculate a sanction under the statute; although it analyzed the trial court's fee award under that methodology, the court concluded that the trial court did not abuse its discretion in making its fee award.[210] The *Racy* court, however, was affected by the fact that counsel for the party seeking fees agreed to charge the client a low hourly rate, and the trial court adopted the rate as the basis for its fee award.[211] Under the proper lodestar calculation, the actual, not the *theoretical*, hourly rate should be

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205. *Id.* at 434 (internal citations omitted).

206. *See* Roberson v. Perez, 123 Wash. App. 320, 344–45, 96 P.3d 420 (2004). *See also* Brand v. Dep't of Labor & Indus., 139 Wash. 2d 659, 666, 989 P.2d 1111 (1999) (noting that awarding full attorney fees under the Industrial Insurance Act to workers will ensure adequate representation for injured workers).

207. *Roberson*, 123 Wash. App. at 344.

208. *See, e.g.*, Zink v. City of Mesa, 137 Wash. App. 271, 277, 152 P.3d 1044 (2007), *review denied,* 162 Wash. 2d 1014 (2008).

209. 149 Wash. App. 307, 202 P.3d 1024 (2009).

210. *Id.* at 314–16.

211. *Id.* at 315.

applied in any event and adjusted upward or downward after the lodestar is calculated.[212]

The lodestar methodology is a well-developed means of requiring a court to "show its work."[213] It must identify which hours, for example, were spent by the attorneys to achieve a favorable result. This prevents counsel from claiming excessive or unnecessary time as part of a discovery sanction.[214] For Washington courts to simply impose whatever fee award they choose without a methodology to establish that the fee is reasonable departs from the wise mandate that sanctions should not be confused with fee-shifting statutes; rather, sanctions should represent the amounts *reasonably expended* to respond to the improper conduct.

The appropriate rule for calculating a reasonable attorney fee in a CR 11, RCW 4.84.185, frivolous appeal, or discovery sanction case should be the lodestar method.

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212. *Id.* at 316.

213. Bowers v. Transamerica Title Ins. Co., 100 Wash. 2d 581, 205–06, 675 P.2d 193 (1983) (finding nothing in trial court record to suggest an upward adjustment of rate due to attorneys' performance); Scott Fetzer Co. v. Weeks, 114 Wash. 2d 109, 123, 786 P.2d 265 (1990) (determining that the trial court did not limit award to extra litigation efforts); Mahler v. Szucs, 135 Wash. 2d 398, 435, 957 P.2d 632 (1998) (holding that findings of fact and conclusions of law are required to establish such a record).

214. Pham v. City of Seattle, 159 Wash. 2d 527, 538–39, 151 P.3d 976 (2007) (affirming the trial court's decision to exclude time spent on unsuccessful activities associated with an otherwise successful claim).