SANCTIONS IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE UNITED STATES DISTRICT COURTS FOR THE EASTERN AND WESTERN DISTRICTS OF VIRGINIA

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for the Eastern District of Virginia, Richmond Division

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I. RULE 11 - LIMITATIONS IN APPLICABILITY

A. Applicability of Rule 11 to Actions Removed from State Court

1. Because at the time the state pleading is signed, the signing attorney is not subject to the Federal Rule of Civil Procedure, the Fourth Circuit has recognized that "Rule 11 sanctions cannot be imposed for pleadings filed in state court when the action is later removed to federal court." *Integrated Healthcare Sys., Inc. v. Horbach*, No. 98-1480, 1999 U.S. App. LEXIS 13205, at *9 (4th Cir. June 14, 1999) (citing *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 257 (4th Cir. 1987)). However, such sanctions "are available for false pleadings filed in federal court after the state court action is removed." *Id.* (citing *Meadow Ltd. Partnership v. Meadow Farm P'ship*, 819 F.2d 970, 970-71 (4th Cir. 1987)).

2. Further, the court in *Integrated Healthcare Systems* found that, while the papers filed by the plaintiff in the state court action which was later removed to the federal court cannot be the subject of Rule 11 sanctions, the filing of an amended complaint may be subject to sanctions. *Integrated Healthcare Sys., Inc.,* 1999 U.S. App. LEXIS 13205, at *9. However, if the only action of the party in the federal court is to request dismissal, Rule 11 sanctions may not be imposed. *Kirby*, 811 F.2d at 257.

B. Rule 11 Does Not Apply to Appellate Proceedings

1. While Rule 11 does not apply to conduct during the appellate proceedings, "[a] court may sanction a party [for conduct during the proceeding in district court] even if that party has filed a notice of appeal of the case which resulted in the offending conduct, and that appeal is pending." *Price v. First Star Mortg.*, Civ. Action No. 2:03cv568, 2006 U.S. Dist. LEXIS 60580, at *8 n.3 (E.D. Va. Aug. 15, 2006).

C. Rule 11 is Inapplicable to Discovery, Which is Governed by Rule 37

1. The text of Rule 11 makes it inapplicable to "disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37." Fed. R. Civ. P. 11(d).

2. Nevertheless, courts remain free to control discovery practice through the detailed provisions of Rule 37. For instance, as a Rule 37 sanction for discovery violations, a court may, among other actions, "strik[e] pleadings in whole or in part," "dismiss[] the action or proceeding in whole or in part," or "render[] a default judgment against the disobedient party." Fed. R. Civ. P. 37(b)(2)(A).

3. However, Rule 37(a)(5)(A)(ii) provides that a district court must not order sanctions if the opposing party's position was "substantially justified." *Id.*

A legal position is "substantially justified" if there "is a genuine dispute as to proper resolution or if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Decision Insights, Inc. v. Sentia Grp.*, Inc., 311 Fed. Appx. 586 (4th Cir. 2009).

II. RULE 11 - REPRESENTATIONS TO THE COURT

A. **Certifications Made by Signing or Advocating**

1. Rule 11 provides that by presenting to the court a pleading, written motion, or other paper, an attorney or a *pro se* litigant represents that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

    a. It is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

    b. The claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law;

    c. 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

    d. 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.

B. **Oral Statements**

1. Rule 11 sanctions generally are imposed in the context of written pleadings. In *Columbia Venture LLC v. FEMA (In re Bees)*, 562 F.3d 284, 289 (4th Cir. 2009), for instance, the attorney claimed that the district court erred in sanctioning her on the basis of her briefing and an oral statement made by her on behalf of the agency at a hearing. The appellate court concluded that the agency's declaration supporting its motion to dismiss contained a clerical mistake rather than a deliberate attempt to mislead, and that the agency's error in one portion of its brief in opposition to the landowner's motion to vacate was an inadvertent mistake, not a deliberate attempt to mislead or a failure to conduct a reasonable inquiry. *Id.* Moreover, the appellate court buttressed its conclusion by stating that Rule 11 "severely limits a court's ability to sanction counsel for oral statements." *Id.*

C. Conduct is Measured by an Objective Standard of Reasonableness

1. The Fourth Circuit has recognized that in deciding whether a Rule 11 sanction is to be applied, the court must apply a standard of "objective reasonableness." *See Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987) (stating that the inquiry is whether a reasonable attorney in like circumstances could believe his actions to be factually and legally justified) (emphasis added); *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 872 F.2d 984, 987 (4th Cir. 1987); *see also Lake Wright Hospitality, LLC v. Holiday Hospitality Franchising, Inc.*, Civ. Action No. 2:07cv530, 2009 U.S. Dist. LEXIS 73903, at *9 (E.D. Va. Aug. 20, 2009).

2. The objective reasonableness standard replaced the former subjective good-faith standard. *Cleveland Demolition Co.*, 872 F.2d at 987.

3. While the objective reasonableness standard does not allow courts to consider subjective factors when ruling whether conduct violates Rule 11, "subjective factors may be considered in determining what sanctions should be imposed." *Weisman v. Alleco, Inc.*, 925 F.2d 77, 80 (4th Cir. 1991) ("[s]tress and ill health do not excuse the violation of the rule, but the presence of such factors may mitigate the punishment") (emphasis added).

D. Document Presented for Improper Purpose – Rule 11(b)(1)

1. *Definition of "Improper Purpose"*: Rule 11 defines the term "improper purpose" to include actions that are meant to "harass or to cause unnecessary delay or needless increase in the costs of litigation." Fed. R. Civ. P. 11(b)(1).

2. The Fourth Circuit has elaborated that "[i]f a complaint is not filed to vindicate rights in court, its purpose must be improper." *In re Kunstler*, 914 F.2d 505, 518 (4th Cir. 1990). Further, if the complaint was filed in order to vindicate rights in court as well as for some other potentially improper purpose, the purpose to vindicate rights in court must be "central and sincere." *Id.*

3. *Standard:* In determining whether a party has filed a motion or pleading for an improper purpose, a district court must judge the conduct of counsel under an objective standard of reasonableness rather than assessing subjective intent. *Id.*; *accord Field v. GMAC LLC*, No. 2:08cv294, 2009 U.S. Dist. LEXIS 127533, at *5-6 (E.D. Va. Jan. 30, 2009). "In other words, it is not enough that the injured party subjectively believes that a lawsuit was brought to harass, or to focus negative publicity on the injured party; instead such improper purposes must be derived from the motive of the signer in pursuing the suit." *Kunstler*, 914 F.2d at 518-19.

"Circumstantial facts surrounding the filing may also be considered as evidence of the signer's purpose." *Id.* at 519.

4. By way of example, the court in *Kunstler* relied on the substantial number of allegations in the complaint which lacked a basis in either law or fact, and also on the fact that the counsel filing the complaint was clearly not inexperienced, to infer that the counsel never intended to litigate the action and, therefore, filed it for improper purpose. *Id.*

5. In another case, the Fourth Circuit relied on circumstantial evidence and found that the action in federal court was filed by the plaintiff in an attempt to compel Virginia circuit court judge to recuse himself from a pending state case and, therefore, was brought for an improper purpose. *Chu v. Griffith*, 771 F.2d 79, 81 (4th Cir. 1985).

E. Legal Contentions Warranted by Law or Non-Frivolous Argument for Extending, Modifying or Reversing Existing Law – Rule 11(b)(2)

1. *Pre-Filing Investigation Requirement*: "The language of Rule 11 requires an attorney to conduct a reasonable investigation of the factual and legal basis of his claim before filing." *Brubaker v. City of Richmond*, 943 F.2d 1363, 1373 (4th Cir. 1991).

2. "The prefiling investigation of the law will not pass muster under Rule 11 where the complaint has 'absolutely no chance of success under the existing precedent.'" *Id.* (quoting *Cleveland Demolition Co.*, 827 F.2d at 988) (emphasis added); *see also Reaves v. Roanoke Redev. & Hous. Auth.*, Civ. Action No. 7:08-cv-00560, 2009 U.S. Dist. LEXIS 10703, at *19 (W.D. Va. Feb. 12, 2009) ("Rule 11 sanctions are appropriate where a party files a claim barred by res judicata.").

3. In evaluating whether a complaint has absolutely "no chance" of success under the existing precedent, the Fourth Circuit has recognized that "[a]lthough a legal claim may be so inartfully pled that it cannot survive a motion to dismiss, such a flaw will not in itself support Rule 11 sanctions – only the lack of any legal or factual basis is sanctionable." *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 153 (4th Cir. 2002) (citing *Simpson v. Welch*, 900 F.2d 33, 36 (4th Cir. 1990)).

4. While Rule 11 "attempts to discourage the needless filing of groundless lawsuits," it is not meant to "stifle the exuberant spirit of skilled advocacy or to require that a claim be proven before a complaint can be filed." *Hunter,* 281 F.3d at 153 (citing *Cleveland Demolition Co.*, 827 F.2d at 988). Therefore, "creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment." *Id.* (citing *Brubaker*, 943 F.2d at 1373).

5. For example, in *Hunter v. Earthgrains Co. Bakery*, the Fourth Circuit found that district court abused its discretion in sanctioning an attorney who asserted a claim which was contrary to the circuit precedent, but on which the circuits were split. 281 F.3d at 153-57. Moreover, the fact that the attorney failed to "provide the court with a thorough exposition on the circuit split" in her filing did not render her position frivolous. *Id.*

F. **Factual Contentions – Rule 11(b)(3)**

1. "When the court is considering sanctions on a factual claim, 'the initial focus of the district court should be on whether an objectively reasonable evidentiary basis for the claim was demonstrated in pretrial proceedings or at trial.'" *Edmonds v. Gillmore*, 988 F. Supp. 948, 957 (E.D. Va. 1997) (citing *Calloway v. Marvel Entm't Grp.*, 854 F.2d 1452, 1470 (2d Cir. 1988)).

2. Under Rule 11, "a complaint containing allegations unsupported by any information obtained prior to filing, or allegations based on information which minimal factual inquiry would disprove, will subject the author to Rule 11 sanctions." *Baker v. Booz Allen Hamilton, Inc.*, 358 Fed. Appx. 476, 483-484 (4th Cir. 2009). Thus, "[t]o be reasonable, the prefiling factual investigation must uncover some information to support the allegations in the complaint." *Brubaker*, 943 F.2d at 1373.

3. For instance, in *Givens v. O'Quinn*, the Fourth Circuit held that an attorney did not have any factual basis for her recusal claim against a district court judge based on the alleged bias by the judge when the attorney based such a claim on "superficially 'statistical' and even misleading" analysis of the cases decided by the judge, on the attorney's own recollection of the instances of judge's alleged bias during the conduct of prior cases, and on opinions of unnamed lawyers. 186 Fed. Appx. 390, 394-95 (4th Cir. 2006). In concluding that there was no factual basis for the claim, the *Givens* court first pointed out that the plaintiff was not justified in relying on the "statistical analysis" because the analysis was not in accordance with established statistical principles, which might be replicated and refuted. *Id.* Secondly, the court found there the attorney could not rely on informal options of unnamed lawyers because such information "is no more factual than would be schoolyard gossip about a teacher." *Id.* Finally, the court concluded that the attorney was unjustified in basing her motion "merely [on her] subjective perception and corrupted memory [of the occasions on which the judge was allegedly bias] and … not examin[ing] any of the court records or transcripts that would have corrected her mistaken recollections." *Id.*

4. In *Walker v. S.W.I.F.T. SCRL,* the district court stated that parties cannot establish a reasonable factual basis by reference to unnamed or anonymous sources in a newspaper article because, if an anonymous

source remains anonymous, there appears to be no way to conduct a reasonable inquiry into the facts required by Rule 11. 517 F. Supp. 2d 801, 806-07 (E.D. Va. 2007).

5. In the recent matter of *Lake Wright Hospitality, LLC v. Holiday Hospitality Franchising, Inc.*, 2009 U.S. Dist. LEXIS 73903 (E.D. Va. Aug. 20, 2009), the district court imposed eleven separate instances of sanctions of $750 per paragraph for "misleading and baseless factual allegations." *Id.* at *3. The court acknowledged that that fraud cases often must be predicated on - and pieced together from - limited circumstantial evidentiary bases because of sophisticated perpetrators. However, the court held that the "plaintiff did not merely employ circumstantial evidence to allege facts supported only by inference in its counterstatement. Instead, plaintiff made factual contentions that were not only utterly misleading and unsupported by record evidence but, in some cases, outright misrepresentations."

G. Denials Warranted by Evidence – Rule 11(b)(4)

1. While Rule 11 requires only some prefiling factual information before denying factual allegations, an attorney who is well versed in the facts of the case might be held to a higher standard then an attorney unfamiliar with the matter. *Artco Corp. v. Lynnhaven Dry Storage Marina, Inc.*, 898 F.2d 953, 956 (4th Cir. 1990). In *Artco*, the Fourth Circuit held that the counsel for the defendant violated Rule 11 when he denied that the plaintiff fully performed its obligations under the settlement agreement. The court noted that because the counsel for the defendant had been involved in negotiating the terms of the settlement agreement and subsequent arbitration of the plaintiff's compliance with such terms, he "should have been well versed in the facts of the case" and could not "escape responsibility for his actions by asserting that such denials would have been reasonable if filed by an attorney unfamiliar with the case who had conducted the minimum inquiry acceptable under Rule 11." *Id.*

H. The Court Should Avoid Hindsight and Resolve Doubts in Favor of the Signor

1. In applying the objective standard of reasonableness to determine whether Rule 11 violation occurred, the "court should avoid hindsight and resolve all doubts in favor of the signor." *Edmonds v. Gillmore*, 988 F. Supp. 948, 957 (E.D. Va. 1997) (citing *Calloway v. Marvel Entm't Group*, 854 F.2d 1452, 1469-70 (2d Cir. 1988)).

I. **No Continuing Obligation to Re-evaluate Certification, Pleading or Motion ("Snapshot View")**

1. The Fourth Circuit expressly has found that Rule 11 does not impose on a litigant a continuing obligation to re-evaluate the merits of the claim. *Brubaker*, 943 F.2d at 1381-82. The court reasoned that "Rule 11, by its own terms, can never be the basis for sanctions for failure to file certain papers" and that requiring a continuing obligation to reevaluate the merits of the case would be tantamount to sanctioning a failure to file. *Id.* at 1381 (citing *Simpson v. Welch*, 900 F.2d 33 (4th Cir. 1990)).

2. An illustration of this point occurred in *Brubaker*, where the court found that while the plaintiff had learned of lack of evidence supporting plaintiff's case through deposing the defendant, Rule 11 sanctions were only proper after the plaintiff filed with the court a memorandum opposing defendant's motion for summary judgment. *Id.* at 1383. This is consistent with the Fourth Circuit's admonition that "Rule 11 empowers the district court to sanction a party or lawyer for insisting on a position after it is no longer tenable." *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 279 (4th Cir. 2006).

III. SANCTIONS UNDER RULE 11 AND RULE 37

A. **The Text of the Rules**

1. The text of Rules 11 and 37 provide detailed guidance with respect to the procedural and substantive aspects of motions practice under those rules. Prior to making any request for relief under either Rule 11 or Rule 37, litigants should review the specific language of these rules.

B. **Motion by a Party and Pre-Filing Requirements**

1. *Rule 11 "Safe Harbor" Prerequisite to Filing*: The "safe harbor" provisions of Rule 11 require the party seeking sanctions to serve the Rule 11 motion on the opposing party at least twenty-one days before filing the motion with the district court. Sanctions may be sought only if the challenged pleading is not withdrawn or corrected within twenty-one days after service of the motion. Fed. R. Civ. P. 11(c)(2).

2. The Fourth Circuit has held that the "safe harbor" provision "imposes *mandatory* obligations upon the party seeking sanctions, so that failure to comply with the procedural requirements precludes the imposition of the requested sanctions." *Brickwood Contrs., Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 389 (4th Cir. 2004) (en banc) (emphasis added).

3. However, a movant's failure to comply with the "safe-harbor" provision affects only the district court's authority to impose sanctions requested by

a party, and would have no effect on the court's authority to *sua sponte* impose sanctions under Rule 11(c)(3). *Id.* at 389 n.2.

4. Prior to the 1993 amendment, courts held that a voluntary dismissal of a claim did not strip a court of its power to impose Rule 11 sanctions. *See Bakker v. Grutman*, 942 F.2d 236, 241 (4th Cir. 1991) (citing *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2455 (1990)). However, following the addition of the "safe harbor" provisions in 1993, the Fourth Circuit found that the "safe harbor" "preclude[s] the serving and filing of any Rule 11 motion after conclusion of the case." *Hunter*, 281 F.3d at 152; *see also Brickwood Contrs., Inc.*, 369 F.3d at 389 (citing *Hunter* for the proposition that "[b]ecause the [Rule 11] requires that the party submitting the challenged pleading be given an opportunity to withdraw the pleading, sanctions cannot be sough after summary judgment has been granted"); *Cincinnati Ins. Co. v. Dynamic Dev. Group, LLC*, 336 F. Supp. 2d 552, 569 (M.D.N.C. 2004).

5. Under similar logic, certain courts also have held that Rule 11 sanctions cannot be imposed against a lawyer who has already withdrawn from the case. *Peer v. Lewis*, 606 F.3d 1306 (11th Cir. 2010). This issue, however, has not been resolved within the Fourth Circuit.

6. Additionally, courts outside of the Fourth Circuit have held that a plaintiff may avoid the imposition of sanctions under Rule 11 when the plaintiff amended the complaint that was the focus of the motion for sanctions within twenty-one days of filing. *Sneller v. City of Bainbridge Island*, 606 F.3d 636 (9th Cir. 2010); *see also In re: Sony Corp. SXRD Rear Projection Television Mktg., Sales Price & Prods. Liab. Litig.*, Civ. Action No. 09-md-02102 (S.D.N.Y. July 22, 2010) (granting Rule 11 sanctions for counsel's refusal to strike or correct unsupported allegations until 58 days after receiving a safe harbor notice from opposing counsel).

7. *Certification of Compliance under Rule 37*: Rule 37 contains a similar pre-filing requirement, and provides: "On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

C. *Sua Sponte* by the Court

1. Rule 11(c)(3) authorizes a district court to sanction a party *sua sponte* after issuing a show cause order. Fed. R. Civ. P. 11(c)(3). However, the Fourth Circuit noted that because "a *sua sponte* show cause order deprives a lawyer against whom it is directed of the mandatory twenty-one day safe harbor provision provided by the 1993 amendments to Rule 11" the court

is “obliged to use extra care in imposing sanctions on offending lawyers.” *Hunter*, 281 F.3d at 151 (citing *United Nat’l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1115-16 (9th Cir. 2001)).

2. However, “[b]ecause a *sua sponte* order to show cause does not provide an attorney with Rule 11’s twenty-one day safe harbor provision, a court is obliged to use extra care in imposing *sua sponte* sanctions on offending lawyers. Courts generally should reserve such sanctions for situations that are akin to a contempt of court.” *In re Bees*, 562 F.3d 284, 287 (4th Cir. 2009).

3. Rule 37 also authorizes a district court to sanction a party *sua sponte* for failure to obey a discovery order. Rule 37 provides that “if a party or a party’s officer, director, or managing agent - or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rules 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.”

D. **Initiation of Rule 11 Sanctions After Settlement or Voluntary Dismissal**

1. Under the plain text of Rule 11, a court may not impose monetary sanctions “unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims.” Fed. R. Civ. P. 11(c)(5)(B)

E. **Who May be Sanctioned**

1. Rule 11 authorizes the district court to sanction “attorney, law firm, or party that violated the rule or is responsible for the violation.” Fed. R. Civ. P. 11(c)(1). Moreover, while the imposition of sanction is not mandatory, the district court, absent exceptional circumstances, must hold the law firm jointly responsible for a violation committed by its partner, associate, or employee. Fed. R. Civ. P. 11(c)(1).

2. The Fourth Circuit also has found that, however, while “Rule 11 imposes upon substitute counsel a duty to investigate the legal and factual sufficiency of the claims he or she takes up … until substitute counsel files some paper indicating an intention to continue prosecution of the suit, such a decision will not be presumed by looking to the complaint itself,” and, therefore, no Rule 11 sanctions may be imposed until some further filing occurs. *Bakker v. Grutman*, 942 F.2d 236, 240 (4th Cir. 1991).

3. Under Rule 37, upon a party’s failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection, “the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other

circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d)(3).

F. ***Pro Se* Litigants**

1. By its terms, Rule 11 applies to *pro se* litigants as well as to attorneys. Fed. R. Civ. P. 11(a), (b). Courts in several circuits found that a *pro se* litigant is held to the same objective reasonableness standard under Rule 11 as an attorney. *See*, *e.g.*, *Richter v. New York*, 703 F.Supp. 318 (S.D.N.Y. 1989). However, the courts in the Eastern District of Virginia noted that, while Rule 11 requires that "an attorney or *pro se* litigant conduct a reasonable investigation of the factual and legal basis for his claim before filing," and that "inexperienced or incompetent attorneys are not held to a lesser standard, the court may consider the special circumstances surrounding *pro se* litigants in determining whether sanctions are appropriate." *Leach v. Smith*, Civ. Action No. 4:06cv155, 2007 U.S. Dist. LEXIS 53836, at *4-5 (E.D. Va. 2007).

2. Under Rule 37, even if the plaintiff appears *pro se*, the court may grant sanctions if the *pro se* litigant's refusal to comply with procedural requirements or court orders warrant such a sanction. *See*, *e.g.*, *Middlebrooks v. Sebelius*, Civ. Action No. PJM 04-2792, 2009 U.S. Dist. LEXIS 71966 (D. Md. Aug. 13, 2009) (dismissing *pro se* plaintiff's case pursuant to Rule 37(d)); *Taylor v. Fresh Fields Mkts., Inc.*, Civ. Action No. 94-0055-C, 1996 U.S. Dist. LEXIS 10051 (W.D. Va. June 27, 1996), *aff'd*, 112 F.3d 510 (4th Cir. 1997) (dismissing *pro se* plaintiff's case pursuant to Rules 37(d) and 41(b)); *Robinson v. Yellow Freight Sys.*, 132 F.R.D. 424 (W.D.N.C. 1990), *aff'd*, 923 F.2d 849 (4th Cir. 1991) (upholding dismissal with prejudice of *pro se* plaintiff's claim pursuant to Fed. R. Civ. P. 37(b) and (d)).

G. **Imposition of Sanctions – Judicial Discretion**

1. If the court determines that a party violated Rule 11(b), the court "may," but is not required, to impose sanctions. Fed. R. Civ. P. 11(c)(1).

2. In contrast, Rule 37 provides, in pertinent part: "If the motion [to compel] is granted or if the disclosure or requested discovery is provided after the motion was filed, the court *shall*, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust." Fed. R. Civ.

P. 37(a)(4)(A) (emphasis added); *see also Graves v. Indus. Power Generating Corp.*, Civ. Action No. 3:09cv717, 2010 U.S. Dist. LEXIS 72960, at *13 n.5 (E.D. Va. July 20, 2010) ("Because the Court will grant Ingenco's motion, it must impose a sanction on Graves in the form of fees. Rule 37 requires this action."); *see also* Fed. R. Civ. P. 56(g) (If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.").

3. Thus, "[a] rebuttable presumption exists in favor of imposing expense shifting sanctions on the party against whom a motion to compel disclosures or discovery is resolved. . . ." 7 Moore's Federal Practice § 37.23. And, upon the granting of a motion to compel, the Rule makes the award of sanctions mandatory unless the court, in its discretion, finds that the opposing party's actions were justified or that an award would otherwise be unjust. *Am. Zurich Ins. Co. v. Doherty*, Civ. Action No. 1:05cv866, 2006 U.S. Dist. LEXIS 34578, at *6-7 (E.D. Va. May 19, 2006).

H. Monetary Sanctions Under Rule 11

1. While the imposition of sanctions under Rule 11 is discretionary, sanctions "must be limited to what suffices to deter repetition of the conduct or comparable conduct by other similarly situated." Fed. R. Civ. P. 11(c)(4); *see also Hunter*, 281 F.3d at 151.

2. By way of example, in *In re Kunstler*, 914 F.2d at 522, the Fourth Circuit found that the district court erred in focusing on monetary sanctions. The court stated that while the amount of expense borne by opposing counsel in combating frivolous claims may well be an appropriate factor for a district court to consider, the primary purpose of Rule 11 is to deter future litigation abuse. *Id.*

3. The Fourth Circuit found that in deciding upon the appropriateness of a monetary sanction under Rule 11, the court should consider the following factors:

   a. The reasonableness of the opposing party's attorneys' fees;

   b. The minimum sanctions needed to deter;

   c. The ability of the party subject to sanctions to pay; and

   d. Factors related to the severity of the Rule 11 violation. *Id.* at 523.

4. Under Rule 11, however, "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." Fed. R. Civ. P. 11(c)(5).

I. Nonmonetary Sanctions under Rule 11

1. *Rule 11*: Similar to the imposition of monetary sanctions under Rule 11, the imposition of nonmonetary sanctions, such as prefiling injunctions, are appropriate only when they are necessary to deter future litigation abuse. *Mazur v. Woodson*, 191 F. Supp. 2d 676, 684 (E.D. Va. 2002) (refusing to award monetary sanctions when pre-filing injunction was deemed to be sufficient to deter future frivolous litigation).

2. The district court in *Abbott v. SunTrust Mortg., Inc.*, Civ. Action No. 3:08cv665, 2009 U.S. Dist. LEXIS 29265, at *14 (E.D. Va. Apr. 8, 2009), recognized that when determining whether a prefiling injunction is appropriate, a court should consider:

   a. The litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits;

   b. The litigant's motive in pursuing the litigation, *e.g.*, does the litigant have an objective good faith expectation of prevailing;

   c. Whether the litigant is represented by counsel;

   d. Whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and

   e. Whether other sanctions would be adequate to protect the courts and other parties.

3. After taking into account plaintiff's history of filing "harassing and duplicative lawsuits," the district court in *Abbott* enjoined the plaintiffs from filing further actions involving the subject matter of the action as well as from filing any further action or pleading of any kind in the District Court for the Eastern District of Virginia until the plaintiffs provided proof that they have paid the monetary sanction imposed by the court. *Id.* at *17. The court additionally ordered that, even after the plaintiffs satisfy the monetary sanction, they must seek leave of court to file any further litigation on any subject matter in the United States District Court for the Eastern District of Virginia. *Id.* at *18, *see also In re: Peanut Corp. of Am.*, Civ. Action No. 6:10cv00027, 2010 U.S. Dist. LEXIS 90801, at *18-19 (W.D. Va. Sept. 1, 2010) (enjoining *pro se* plaintiff "from filing any actions in the Western District of Virginia without first obtaining leave of Court, which will not be granted unless the

action is (1) not frivolous; (2) filed in good faith; and (3) a new claim that has not been disposed of by any court in any previous action").

J. **Monetary Sanctions Under Rule 37**

1. Court may order costs, including reasonable attorney's fees associated with discovery deficiencies in lieu of ordering more drastic sanctions, such as excluding evidence or expert witnesses. *Lathon v. Wal-Mart Stores East, LP*, Civ. Action No. 3:09cv57, 2009 U.S. Dist. LEXIS 54682, at *6-12 (E.D. Va. June 24, 2009).

K. **Nonmonetary Sanctions Under Rule 37**

1. Rule 37 lists a number of nonmonetary sanctions available to a district court judge:

   a. Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

      i. The court can order a negative inference instruction regarding the discovery or facts at issue. *See Harkabi v. SanDisk Corp.*, No. 08 Civ. 8203 (WHP) (S.D.N.Y. Aug. 23, 2010) (ordering Rule 37 sanctions against defendant in the form of negative inference to the jury because of defendant's failure to properly handle relevant electronic discovery, which was lost); *see also Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 470-71 (S.D.N.Y. 2010) (ruling that a party's failure to preserve and collect electronic files from key witnesses constituted gross negligence and justified an adverse inference instruction).

   b. Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

   c. Striking pleadings in whole or in part;

   d. Staying further proceedings until the order is obeyed; dismissing the action or proceeding in whole or in part; and

   e. Rendering a default judgment against the disobedient party;

      i. Generally, a warning and opportunity to comply are necessary prerequisites before entering default judgment under Rule 37. *Itathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 40-41 (4th Cir. 1995).

f. Treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

2. Courts have other discretion to award other nonmonetary sanctions under Rule 37.

   a. These sanctions can include a continuance to allow the requested discovery to occur. *See*, *e.g.*, *Tenbarge v. Ames Taping Tool Sys.*, 190 F.3d 862, 865 (8th Cir. 1999).

   b. For example, in *Wu v. Tseng*, Civ. Action No. 2:06cv580, 2008 U.S. Dist. LEXIS 73688 (E.D. Va. Sept. 22, 2008), Plaintiffs attempted to satisfy an $11 million judgment against Stanley Tseng in a Florida state court. Finding that defendants had acted in bad faith in failing to comply with certain discovery requests and a court order to comply with such requests, the court imposed sanctions on defendants under Fed. R. Civ. P. 37 and E.D. Va. Local Rule 37(D). Plaintiffs demonstrated defendants were acting in bad faith, that their conduct prejudiced defendants, there is a need to deter defendants behavior (unwillingness to comply with the most basic types of discovery request), and that less drastic sanctions were not appropriate based on defendants' prior conduct including blatant violation of a discovery order. The court awarded plaintiffs' attorney's fees in the amount of $11,650.

   c. In *Spicer v. Universal Forest Prod.*, Civ. Action No. 7:07cv464, 2008 U.S. Dist. LEXIS 77232 (W.D. Va. Oct. 1, 2008), finding the defendant failed to provide a knowledgeable witness under the requirements of Fed. Rule Civ. P. 30 (b)(6), the court ordered defendant Universal to pay plaintiff's attorneys' costs and fees associated with the preparation and filing of the Rule 30(b)(6) Notice, and Amended Notice, any motions filed concerning the scope of these notices, travel to the Rule 30(b)(6) deposition, and filing preparation and argument on the motion for sanctions. The court held that a corporation must make a good-faith effort to designate people with knowledge of the matter sought and must adequately prepare its representatives for deposition.

3. Factors to consider in determining whether to impose sanctions under Rule 37 – *Wilson v. Volkswagen of Am., Inc.*, 561 F2d 494, 503-05 (4th Cir. 1977):

   a. Whether the non-complying party acted in bad faith;

      i. *Calkins v. Pacel Corp.*, Civ. Action No. 3:07cv00025, 2008 U.S. Dist. LEXIS 43937 at *19-26 (E.D. Va. June 4, 2008) (finding, among other things, that plaintiffs had "months of

total non-compliance with their discovery obligations despite numerous remainders by the court and opposing counsel with "cavalier indifference towards their obligations").

ii. *Wyche v. Virginia State Univ.*, Civ. Action No. 3:04cv766, 2005 U.S. Dist. LEXIS 8705, at *7-8 (E.D. Va. 2005) (finding bad faith where plaintiffs completely ignored the Federal Rules of Civil Procedure and court orders, refused to comply with her discovery obligations and failed to prosecute her case), *aff'd*, 2005 U.S. App. LEXIS 23464 (4th Cir. Oct. 28, 2005).

b. The prejudice suffered by the other party;

i. *Calkins*, 2008 U.S. Dist. LEXIS 43937 at *19-26 (finding prejudice to defendants where defendants incurred substantial attorney's fees and was hindered in pursuing its counterclaim by withholding material information and evidence as a result of plaintiffs' non-compliance).

c. The need for deterrence; and

i. *Id.* (holding that "the need for deterrence is great when litigants behave with such gross disregard for the rules of civil procedure, the Court's orders and the rights of other parties" and "[i]f litigants routinely followed the example set by the counterclaim defendants in this case, the civil justice system would be unable to function").

d. The effectiveness of less drastic sanctions.

i. *Wyche*, 2005 U.S. Dist. LEXIS 8705, at *8 (concluding that "[a]ny lesser sanction than dismissal would only serve to reward Plaintiff's dilatory actions and encourage others to disregard procedural requirements") (citations omitted).

L. Spoliation Under Rule 37

1. A frequent request for sanctions under Rule 37 regards claims for spoliation of evidence. Sanctions for spoliation can run the gamut from an adverse inference to dismissal, depending on the intent of the party destroying the evidence and the resulting prejudice to the moving party. *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 285 (E.D. Va. 2001) (noting that spoliation may occur even in the absence of a court order requiring production of particular documents, and further noting that in addressing spoliation, courts have "considerable discretion, including ordering dismissal, granting summary judgment, or permitting an adverse

inference to be drawn against the party as a means of leveling the playing field").

2. As one court in the Eastern District of Virginia has remarked, "[i]t is difficult to imagine conduct that is more worthy of being considered litigation misconduct or more worthy of sanction than spoliation of evidence in anticipation of litigation because that conduct frustrates, sometimes completely, the search for truth." *Samsung Elecs. Co. v. Rambus Inc.*, 439 F. Supp. 2d 524, 535 (E.D. Va. 2006) (emphasis added).

3. Moreover, both state and federal courts have made it clear that all relevant information which is available on electronic storage media is discoverable, whether readily readable ("active") or "deleted" but recoverable. *See*, *e.g.*, *Liggett v. Rumsfeld*, Civ. Action No. 04-1363, 2005 U.S. Dist. LEXIS 34162 (E.D. Va. Aug. 29, 2005) (discussing the discovery of material stored on the defendant's hard drive); *Trigon Ins. Co. v. United States*, 234 F. Supp. 2d 592 (E.D. Va. 2002) (permitting the discovery of "computer generated communications"); *Easley, McCaleb & Assocs., Inc. v. Perry*, No. E-2663 (Ga. Super. Ct. July 13, 1994) ("deleted" files on a party's computer hard drive held to be discoverable, and plaintiff's expert was allowed to retrieve all recoverable files); *Santiago v. Miles*, 121 F.R.D. 636, 640 (W.D.N.Y. 1988) (a request for "raw information in computer banks" was proper and obtainable under the discovery rules).

4. Significantly, the Fourth Circuit does not require a showing of bad faith to warrant dismissal for spoliation. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) (applying federal law to a motion for spoliation and finding that while the offending party's conduct may have been either deliberate or negligent, the prejudice to the non-offending party by the failure to preserve key evidence necessitated dismissal); *see also Rambus Inc.*, 439 F. Supp. 2d at 536 ("[S]ome instances of negligent spoliation will require dismissal [solely] because of the resulting prejudice to the defendant.").

5. The consequences of a finding of spoliation can be severe. *See Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135 (D. Del. 2009) (ruling that certain patents were unenforceable in a patent infringement as a result of the *Rambus's* intentional destruction of documents and back-up tapes; *Rambus, Inc. v. Infineon Tech.*, 222 F.R.D. (E.D. Va. 2004) (requiring Rambus to provide privileged documents because they were related to its document destruction policy); *Qualcomm, Inc. v. Broadcom Corp.*, Case No. 05cv1958-B, 2008 U.S. Dist. LEXIS 911 (S.D. Cal. Jan. 7, 2008) (ordering Qualcomm to pay Broadcom $8.5 million because of its "monumental and intentional discovery violation" which represented all of the attorney's fees and costs incurred by Broadcom in the case).

M. **The Sanction of Dismissal Under Rule 37**

1. "The decision to award sanctions, whether under Rule 11 [or] Rule 37 [] is generally considered nondispositive unless the sanction imposed is itself dispositive of a claim or defense, *i.e.*, the dismissal of a claim or defense." *Bowers v. Univ. of Virginia*, Civ. Action No. 3:06cv00041, 2008 U.S. Dist. LEXIS 44604, at *12 (W.D. Va. June 6, 2008).

2. Accordingly, dismissal can be an appropriate form of sanctions. Courts within the Fourth Circuit traditionally employ a four-part test for determining whether dismissal is a proper sanction under Rule 37:

   a. whether the noncomplying party acted in bad faith;

   b. the amount of prejudice his noncompliance caused his adversary, which necessarily includes an inquiry into the materiality of the evidence he failed to produce;

   c. the need for deterrence of the particular sort of noncompliance; and

   d. the effectiveness of less drastic sanctions.

BizProLink, LLC v. Am. Online, Inc., 140 Fed. Appx. 459, 462 (4th Cir. 2005). The use of this test "insures that only the most flagrant case, where the party's noncompliance represents bad faith and callous disregard for the authority of the district court and the Rules, will result in the extreme sanction of dismissal or judgment by default." *Id.*

N. **Review on Appeal**

1. Consistent with its review of factual determinations generally, the Fourth Circuit has held that "[a]n appellate court 'should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." *McDuffle v. Nissel Sangyo Am., Ltd.*, No. 92-1699, No. 92-1819, 1993 U.S. App. LEXIS 5807, at *4 (4th Cir. 1993).

2. An abuse of discretion standard is also employed for the denial or imposition of sanctions under Rule 37. *Willis v. Town of Marshall*, 275 Fed. Appx. 227, 236 (4th Cir. 2008).

IV. SANCTIONS UNDER 28 U.S.C. § 1927

A. Under 28 U.S.C. § 1927, a Court may award sanctions against an attorney or any other person "who so multiplies the proceedings in any case unreasonably and vexatiously."

B. Section 1927 "focuses on the conduct of the litigation and not the merits." *DeBauche v. Trani*, 191 F.3d 499, 511 (4th Cir. 1999). *Sanford v. Commonwealth*, 689 F. Supp. 2d 802, 806 (E.D. Va. 2010).

C. *Definition of "Vexatious"*: In *Sanford v. Commonwealth*, 689 F. Supp. 2d 802, 811 (E.D. Va. 2010), the Court reviewed several definitions of "vexatious" from a variety of sources, including the following:

1. "'[W]ithout reasonable or probable cause of excuse; harassing; annoying'" (quoting *Black's Law Dictionary* (8th ed. 2004));

2. "'[C]ausing or likely to cause vexation: distressing, afflictive'" (quoting *Webster's New Int'l Dictionary (Unabridged)* 2548 (3d ed. 2002)); and

3. "[I]n no way impl[ying] that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him'" (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

D. Negligent behavior is not sufficient to justify Section 1927 sanctions. *Humanscale Corp. v. Compx Int'l Inc.*, Civ. Action No. 3:09cv86, 2010 U.S. Dist. LEXIS 83876, at *8-10 (E.D. Va. Aug. 16, 2010) (citing *United States v. Wallace*, 964 F.2d 1214, 1219 (D.C. Cir. 1992)).

E. "Vexatious" conduct is not the same as an error in judgment. *Sanford*, 689 F. Supp. 2d at 812.

F. Courts are split whether the Court must find bad faith by counsel as a prerequisite before imposing Section 1927 sanctions. *Compare Brubaker v. City of Richmond,* 943 F.2d 1363, 1382 n.25 (4th Cir. 1991) (requiring a finding of bad faith) *with Sanford*, 689 F. Supp. 2d at 806 (concluding that "unreasonable and vexatious conduct does not require bad faith" and reading the language in *Brubaker* as dictum).

G. The "unreasonable or vexatious" conduct must multiply the proceeding causing the opposing party to incur excess costs and fees. *In Re Gould*, 77 F. App'x 155, 161 (4th Cir. 2003).

H. The dollar amount of the Section 1927 sanction must have a financial correlation and connection to the excess proceedings and "unreasonable and vexatious" conduct. *Sanford*, 689 F. Supp. 2d at 806 (quoting *Peterson v. BMI Refractories*, 124 F.3d 1386, 1396 (11th Cir. 1997).

V. SANCTIONS UNDER THE COURT'S INHERENT POWERS

A. Federal courts have inherent powers to impose sanctions in addition to those specifically authorized by statute. *Sanford*, 689 F. Supp. 2d at 813.

B. In *Sanford*, the Court described the scope of the inherent power as:

> The Court's inherent power to impose sanctions is in some respects broader, and in other respects narrower, than its authority to impose sanctions pursuant to *§ 1927*. It is broader, in that it covers every type of litigation misconduct, unlike rule-based and statutory authorities such as *Rule 11*, *Rule 37*, and *§ 1927*, which concern themselves with specific types of misconduct. But, the Court's inherent power is narrower in that the misconduct required is almost something more egregious than that required for other types of sanctions.

C. Under their inherent power, courts may sanction an attorney who acts in bad faith, wantonly, oppressively or vexatiously. *Royal Ins. v. Lynnhaven Marine Boatel, Inc.*, 210 F. Supp. 2d 562, 567 (E.D. Va. 2002).

D. While the court has the inherent power to sanction, "[i]t is a power that 'ought to be exercised with great caution,' in circumstances such as those involving 'the very temple of justice [being] defiled.'" *Humanscale*, 2010 U.S. Dist. LEXIS 83876, at *9-10.

RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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.

RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

(a) Motion for an Order Compelling Disclosure or Discovery. (1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) Specific Motions. (A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rules 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33, or

(iv) a party fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) Payment of Expenses; Protective Orders. (A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its

reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order. — (1) Sanctions in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) Sanctions in the District Where the Action Is Pending. (A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) - fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose; to Supplement an Earlier Response, or to Admit. — (1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
(B) may inform the jury of the party's failure; and
(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:
(A) the request was held objectionable under Rule 36(a);
(B) the admission sought was of no substantial importance;
(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection. — (1) In General.
(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:
(i) a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or
(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.
(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) ***Failure to Provide Electronically Stored Information.*** — Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) ***Failure to Participate in Framing a Discovery Plan.*** — If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as

required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

28 U.S.C. § 1927

Any attorney or other person admitted to conduct cases in any court of the United States . . . 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.

RULE 7 OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

Rule 7. Service and Filing of Pleadings and Other Papers

Pursuant to the authority granted by Federal Rules of Civil Procedure 5(d)(3) and 83, and Federal Rule of Criminal Procedure 57, the following practices and procedures apply to filing, signing, and verifying documents by electronic means:

* * *

(c) Signatures. The electronic filing of a petition, pleading, motion, or other paper by an attorney who is a registered participant in this Court's CM/ECF system shall constitute the signature of that attorney under Federal Rule of Civil Procedure 11 and for all other purposes.

* * *

LOCAL RULES AND INTERNAL OPERATING PROCEDURES FOR THE FOURTH CIRCUIT

Rule 30(a). Attorney Sanctions for Unnecessary Appendix Designations.

The Court, on its own motion or on motion of any party, may impose sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix. Attorneys shall receive reasonable notice and opportunity to respond before the imposition of any sanction. A party's motion for the imposition of sanctions will be entertained only if filed within 14 days after entry of judgment and only if counsel for the moving party previously objected to the designation of the allegedly unnecessary material in writing to opposing counsel within 14 days of the material's designation.

Rule 46(g). Rules of Disciplinary Enforcement.

(1) A member of the bar of this Court may be disciplined by this Court as a result of:
(a) Conviction in any court of the United States, the District of Columbia, or any state, territory or commonwealth of the United States, of any felony or of any lesser crime involving false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, or theft;
(b) Imposition of discipline by any other court of whose bar the attorney is a member, or an attorney's disbarment by consent or resignation from the bar of such court while an investigation into allegations of misconduct is pending;
(c) Conduct with respect to this Court which violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction in which the attorney maintains his or her principal office, the Federal Rules of Appellate Procedure, the local rules of this Court, or orders or other instructions of this Court; or
(d) Any other conduct unbecoming a member of the bar of this Court.

(2) Discipline may consist of disbarment, suspension from practice before this Court, monetary sanction, removal from the roster of attorneys eligible for appointment as Court-appointed counsel, reprimand, or any other sanction that the Court may deem appropriate. Disbarment is the presumed discipline for conviction of a crime specified in paragraph (1)(a) above. The identical discipline imposed by another court is presumed appropriate for discipline taken as a result of that other court's action pursuant to paragraph (1)(b). A monetary sanction imposed on disciplinary grounds is the personal responsibility of the attorney disciplined, and may not be reimbursed by a client.