Is it too late to seek Rule 11 sanctions?

As every North Carolina litigator should know, Rule 11 of the Rules of Civil Procedure states that, by signing a pleading or "other paper" (motion, subpoena, etc.) related to the litigation, the attorney certifies that,

to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If an opposing party decides that the paper violates one more of these requirements—legal sufficiency, factual sufficiency, or proper purpose—that party can move the court to impose "an appropriate sanction," which may include attorney fees and other expenses. Rule 11 does not, however, set a time limit for filing a Rule 11 motion. So when is it too late? I have been asked this question (or similar ones) a few times in recent months. The short answer, of course, is that it depends on the facts. But I thought I would share the parameters I have observed from reviewing the case law:

Our appellate courts have declined to impose a fixed deadline for filing a Rule 11 motion. Instead they have stated that "a party should make a Rule 11 motion within a reasonable time after …discover[ing] an alleged impropriety. *Renner v. Hawk*, 125 N.C. App. 483, 491 (1997). Whether the timing is reasonable depends on the circumstances, but the question is reviewable *de novo* on appeal and is assessed using an objective standard. *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 607 (2002); *Griffin v. Sweet,* 136 N.C. App. 762, 765 (2000).

A party is not expected to file a Rule 11 motion soon after receiving an improper pleading if discovery or other investigation will be necessary to demonstrate the problem to the court. Such was the outcome in *Renner*, where the court held that a Rule 11 motion was filed within a reasonable time after depositions revealed that the plaintiff's true purpose in filing the action was to gain an advantage in a separate custody dispute. 125 N.C. App. at 491–92. Similar logic applied *Vogler*. The defendant in that case contended from the start that the complaint was baseless, but he was only able to "unequivocally expose[ ] the absence of any factual basis" after deposing plaintiff's representatives. Once that happened, plaintiff voluntarily dismissed the action without prejudice and defendant "promptly" sought a final settlement. After three months with no response from plaintiff, defendant filed his Rule 11 motion. Both the trial court and the Court of Appeals found the timing of the Rule 11 motion reasonable. 152 N.C. App. 599, 607–08 (2002). It also was reasonable in *Stocum v. Oakley* for a defendant to file a Rule 11 motion seeking dismissal of a frivolous complaint, then to file another Rule 11 motion after the plaintiff voluntarily dismissed the complaint and a year later refiled the same meritless claims. 185 N.C. App. 56, 63–64 (2007).

The trial court typically retains jurisdiction over Rule 11 motions after trial, after voluntary

dismissals, and during and (after sometimes after) appeal of the underlying claims. *See, e.g.*, *VSD Communications, Inc. v. Lone Wolf Pub. Group*, *Inc.*, 124 N.C. App. 642, 644 (1996); *Dodd v. Steele*, 114 N.C. App. 632, 634 (1994). It is foreseeable, then, that a party may raise Rule 11 arguments after a court has disposed of the case on its merits. But this does *not* mean that a party can hold that possibility over its opponent's head indefinitely. The Court of Appeals held, for example, that it was unreasonable for defendant to wait until after trial to make a Rule 11 motion where defendant "obviously formed an opinion of the alleged impropriety of plaintiff's pleadings" much earlier in the litigation, apparently even before it filed its answer. *Rice v. Danas, Inc.*, 132 N.C. App. 736, 741 (1999). The court stressed that in that case it was not necessary for defendant to await a jury verdict in its favor before seeking the sanction:

The fact that the jury found against plaintiff is not proof, as a matter of law, that her pleadings were unfounded, baseless, improper, or interposed for an improper purpose. We must be cautious not to allow an adverse jury verdict to dictate the decision on a sanctions motion, as that would amount to taxing the costs of litigation to the losing party, an approach that our legislature has not seen fit to embrace.

*Id.*at 742. Along the same lines, it was objectively unreasonable for plaintiff to file a Rule 11 motion approximately thirteen months after the North Carolina Supreme Court denied defendant's petition for discretionary review of the underlying judgment, particularly where there had been no other activity in the case. *Griffin v. Sweet*, 136 N.C. App. 762, 767–68 (2000). Under this timeline, the alleged Rule 11 impropriety occurred at least two years prior to plaintiff's Rule 11 motion. *Id.* at 765.

In sum, there's no requirement that a party rush a Rule 11 motion to the clerk's office as soon as it believes a filing warrants sanctions. If further development of the record will help the trial court make a sanctions decision, waiting for that process to play out is likely to be found reasonable. But the mere fact that the court's jurisdiction over sanctions can extend past the underlying case does not justify sitting on a Rule 11 motion longer than necessary.