Green Mountain Bureau v. Larkin, 43-1-05Wnsc (Teachout, J., March 29,2007)

STATE OF VERMONT
WASHINGTON COUNTY

GREEN MOUNTAIN BUREAU, LLC,	)	
Plaintiff,	)	**Small Claims Court**
	)	**Docket No. 43-1-05 Wnsc**
v.	)	
	)	
JONATHAN LARKIN,	)	
Defendant.	)	

DECISION
Rule 11 Hearing

Alan A. Bjerke, Esq. and
Bauer, Gravel, Farnham, Nuovo, Parker & Lang

On February 5, 2007, a hearing was held on the Rule 11 issues identified in the Notice of Conduct and Order to Show Cause issued January 11, 2007. Attorney Bjerke and the law firm of Bauer, Gravel, Farnham, Nuovo, Parker & Lang were represented at the hearing by Eric G. Parker, Esq. Amicus Curiae Vermont Legal Aid, Inc., which filed an amicus brief prior to the hearing, appeared through Eric Avildsen, Esq. Defendant Jonathan Larkin was not present. Attorney Parker and Legal Aid filed post-hearing memoranda.

Attorney Bjerke testified extensively at the hearing. No other witnesses testified. The law firm, represented by Attorney Parker, supports the actions and positions of Attorney Bjerke. There are no factual disputes relevant to the Rule 11 issues. For the reasons described below, the court concludes that Attorney Bjerke and the law firm have violated Rule 11(b)(1). Sanctions are imposed as set forth below.

This case is typical of the large number of collections cases in small claims court. Plaintiff/creditor has been represented throughout by Attorney Alan Bjerke, an experienced collections attorney associated with a firm that has one of the largest collections practices in the state, with 5,000 files. Defendant/debtor has been unrepresented at all stages of the case. On February 23, 2005, the court entered judgment in Plaintiff's favor based on Defendant's agreement to the credit account debt as stated in the complaint, and to a payment plan of $100 per month.

On July 11, 2005, Attorney Bjerke filed the first motion for a financial disclosure

hearing. Such a motion is required by rule to be filed "on a form provided by the court clerk." V.R.S.C.P. 7(a). Form 279 (Motion For Disclosure Hearing) has been officially adopted for this purpose. The form actually filed by Attorney Bjerke is identical to the official court form in all respects, including a notation identifying it as Form 279, except that it includes additional language. The additional language appears in bold at the bottom of the form. It is in the same typeface and size as the official form text and plainly appears as part of the official court form. The added language reads, "In addition, the Judgment Creditor may request that the Court issue an Order permitting them to obtain information from one or more Credit Reporting Agencies concerning the Judgment Debtor pursuant to 9 V.S.A. §2480e(a)(1)."

Attorney Bjerke never sought permission to file Form 279 in an altered form, and never notified the court that he had done so. There is no indication that either court staff or the judge at the time became aware of the alteration to the filed form. A court clerk sent a copy of the altered Form 279 to the judgment debtor with the notice of hearing, as she would normally do with a Form 279, and a hearing was scheduled. The motion was later withdrawn by Plaintiff prior to a hearing.

Attorney Bjerke filed a second (and currently pending) motion for a financial disclosure hearing on November 14, 2006. The second motion consists of a filled-out Form 279 without the alteration that appeared on the first form. Filed with the form is a paper bearing a full case caption and the title, "NOTICE TO DEFENDANT IN CONNECTION WITH FINANCIAL DISCLOSURE HEARING." The text of the "Notice" reads:

> Please take notice that in the event you do not appear at the Financial Disclosure hearing described in the enclosed Notice of Hearing, the Plaintiff in your case may, in addition to other requests, ask that the Court order that the Plaintiff may have access to your credit bureau reporting information pursuant to 9 V.S.A. §2480e(a)(1).
>
> You may also contact Plaintiff's attorney directly in advance of the hearing date and make your financial disclosure by telephone. If you do so to the satisfaction of the Plaintiff's attorney, they may cancel the hearing and you would not be required to attend. The telephone number to reach the Plaintiff's attorney is: . . . . You should plan to contact the Plaintiff's attorney well in advance of the hearing.

In bold letters, the Notice states "Court's Copy" at the bottom. This paper includes neither Attorney Bjerke's signature nor mailing address, although the law firm name appears in the left margin. A second copy of the Notice also was filed; it is identical to that described but purports to be "Defendant's Copy" at the bottom.

The cover letter accompanying the motion includes, as the second paragraph: "In addition, I have enclosed two copies of a notice to the Defendant concerning access to credit bureau reporting information. Kindly forward the copy marked 'Defendant's copy' to the Defendant along with the Notice of Hearing. I have also enclosed an additional copy for the

Court's file."[1]

Attorney Bjerke never sought permission from the court to have this "Notice" sent to the judgment debtor by court staff on behalf of the creditor. The cover letter purports to direct court staff to send the Notice in a manner that would have evaded the presiding judge's awareness if court staff had complied. Instead, the unusual request came to the attention of the undersigned. After review of the record, the undersigned issued the Notice of Conduct and Order to Show Cause.

Attorney Bjerke and the law firm acknowledge and defend all of the actions described. The practice described in relation to the first motion was, at the time, used by the firm for all small claims cases statewide and the form was generated pursuant to automated procedures. The practice described in relation to the second motion is currently a firm-wide practice used in all small claims cases statewide in the firm's high-volume collections practice. Neither Attorney Bjerke nor the law firm acknowledges any problems with these practices. It is not clear whether they have made changes following the Order to Show Cause in this case.

Since 2004 or 2005, the law firm has been a member of two credit reporting bureaus. This membership facilitates its access to credit reports when authority is granted for access, either by consent or court order.

Under Rule 1 of the Rules of Small Claims Procedure, "[t]hese rules shall be construed to secure the simple, informal, and inexpensive disposition of every action subject to them." Motion practice is narrowly limited. Under Rule 4, only specified motions are permitted.

There is a specific rule entitled "Financial Disclosure Hearing," Rule 7. It provides that a judgment creditor may file a motion for such a hearing if a lump sum judgment remains unpaid for 30 days, or if an installment on a judgment is overdue for 30 days or longer. The motion is to be filed "on a form provided by the court clerk." Rule 7(a).

Rule 7(b) provides: "Upon receiving such a motion, the court clerk will set a date for hearing and issue a notice of hearing advising the judgment debtor to appear at the hearing to disclose his or her ability to pay the overdue judgment or installment and bring with him or her a completed financial statement on the form supplied with the notice of hearing."

The court's form "Notice of Hearing for a Financial Disclosure Hearing" includes the following provision after the date and time: "The purpose of this hearing is for the judgment debtor to disclose information relating to his or her ability to pay the small claims judgment in full . . . . Following this disclosure hearing, the Court may order the judgment debtor to make such payments as the Court in its discretion deems appropriate." The court's financial disclosure form provides for the disclosure of income, expenses, and assets. It has nothing on it about access to credit reports.

[1] The letter is signed by Jean Couillard. There is no indication of Jean Couillard's role, although she states that Attorney Bjerke is the attorney responsible for the case. Neither Attorney Bjerke nor the law firm disclaims responsibility for the content of the letter.

Rule 11, Generally

The Rules of Civil Procedure are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action." V.C.R.P. 1. Rule 11 embodies the "principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1." F.R.C.P. 11, Advisory Committee Note—1993 Amendments (Federal Rule 11 is substantially similar to Vermont Rule 11). It "reminds attorneys that their role as advocates does not supersede their role as officers of the court." 5A Wright & Miller, Federal Practice and Procedure: Civil 3d § 1334, available on Westlaw. "[P]artisan advocacy is a form of public service as long as it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts, and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult." *Id*. (quoting Fuller & Randall, Professional Responsibility: Report of the Joint Conference, 1958, 44 A.B.A.J. 1159, 1162).

Under Rule 11, by presenting a pleading, written motion, or "other paper" to the court, the attorney or unrepresented party thereby certifies, at risk of sanction, that: 1) the paper is not being presented for an improper purpose; 2) that the legal contentions are warranted; 3) that the factual contentions have, or are expected to have, evidentiary support; and 4) the denials of factual contentions are warranted. V.R.C.P. 11(b). Violations of Rule 11 generally are measured by an objective standard. Wright & Miller, supra §§ 1335, 1337.3.

Rule 11 of the Rules of Civil Procedure is not specifically incorporated into the Rules of Small Claims Procedure. However, "[w]hen matters arise that are not covered by the [small claims] rules, the court will proceed by analogy to any applicable provision of the Vermont Rules of Civil Procedure that is consistent with these rules and with the objective of securing a simple, informal, and inexpensive disposition of the claim." V.R.S.C.P. 13. In accordance with V.R.S.C.P. 13, the court concludes that Rule 11 is applicable, as it is consistent with the Small Claims Rules: the obligations it requires are just as important to fairness in small claims cases as in other civil cases.

July 11, 2005 Motion for Financial Disclosure (First Motion)

Attorney Bjerke's presentation to the court of the altered Form 279, without any request to make the alteration or notice to the court of what was done, was patently deceptive, both to the court and Defendant, and therefore was improper. The alteration to the official court form was plainly calculated to make the altered form appear like the court form. The altered form looks so much like the regular court form that it would normally be processed as a matter of routine by court staff, and that is what occurred. In doing this, Attorney Bjerke surreptitiously enlisted the court's assistance in delivering official-looking information to an unrepresented party that the court otherwise would not have done.

While the court clerk would be likely to process the document without reading it, by contrast, an ordinary unrepresented defendant would be highly likely to read the document, since

it affects his or her individual interests significantly. Such a defendant would have believed that the additional language had the imprimatur of the court, which it specifically did not. This deception is significant even if the assumption is made that Attorney Bjerke would have been entitled, as a matter of procedure and law, to make the request included in the added language.

It is not just that there was noncompliance with the procedural rule requiring the use of the court form. A mere noncompliance with a court rule generally would not, by itself, amount to a Rule 11 violation. The problem is that the nature of the noncompliance involved: (1) a deception that made the Bjerke/law firm altered version appear to be an official court form, (2) an alteration that was not made apparent to the court or likely to be noticed by it, and (3) an implication to defendants that the court approves the content of the added language.

November 14, 2006 Motion for Financial Disclosure (Second Motion)

The same sort of deception inheres in Attorney Bjerke's presentation to the court of the "Notice" and attending cover letter requesting the filing and distribution of "Court's Copy" and "Defendant's Copy." Attorney Bjerke never sought permission from the court to do this. Rather, in the cover letter, his firm's employee directed the court clerk to deliver the Notice to Defendant along with the official hearing notice. Had court staff been less discerning and complied with this request, Attorney Bjerke would have succeeded in enlisting the court's assistance in delivering official-looking information to an unrepresented party that the court otherwise would not have done.

Even though the unsigned Notice appears on law firm stationery, any ordinary unrepresented defendant would have been highly likely to believe that the Notice had the imprimatur of the court, which it specifically did not. The ordinary unrepresented debtor could reasonably conclude that the inevitable outcome of the hearing would be that the creditor would acquire access to his credit report, and he could avoid a hearing (and perhaps missing work) by simply giving permission to release credit information over the phone in advance.

Defenses

Attorney Bjerke maintains that the actions described above were in all ways proper and not in violation of Rule 11. He argues, essentially, that the historical background to these practices demonstrates their propriety, and that he was required to undertake these practices by Judge Rita Flynn Villa, who routinely presides in Chittenden Small Claims Court.

Attorney Bjerke testified as follows.[2] He claims that he is entitled under state and federal law to request an order from the small claims court granting access to a judgment debtor's consumer credit report under 9 V.S.A. § 2480e(a), and that in the past he has requested such orders and had them granted at financial disclosure hearings. In 2005, Judge Villa stated that she

[2] Judge Villa did not testify at the hearing. Although Attorney Bjerke issued her a subpoena, the court quashed the subpoena and ruled that Attorney Bjerke's representations about her involvement would be accepted as true for the purpose of the Rule 11 hearing.

would feel more comfortable considering such requests at financial disclosure hearings if defendants had advance notice that the request would be made.[3] Accordingly, Attorney Bjerke altered Form 279 and used it in all cases in the firm's statewide collections practice, evidently without approval from or notice to any other courts or judges. In a hearing before Judge Villa, she indicated her acquiescence to the practice.

At some point thereafter, one or more court clerks outside of Chittenden County became aware of and objected to the use of the altered Form 279. Attorney Bjerke then raised the issue with the Civil Rules Committee, apparently advising the Committee that some courts required him to alter the form and others prohibited it, and advocating a rule change that would permit alternative forms of a motion for a financial disclosure hearing to be filed. A Civil Rules Committee subcommittee chaired by Attorney Joseph E. Frank addressed the issue and wrote the following in its Report of April 21, 2006:

> **Fourth**, may plaintiffs or their attorneys alter the form provided by the clerk under VRSCP 7(a) for motions for financial disclosure hearings? No. The intent of Rule 7(a) is fairly clear on its face—what's optional is the filing of the motion. An official form is prescribed for the sake of uniformity and simplicity in small claims procedure. Until the official form is changed by the Court Administrator, it must be used if the option to file a motion for a financial disclosure hearing is being exercised. Attorney Bjerke's contrary argument is simply wrong.

Attorney Bjerke knew of this, but believed that his request for a rules or form amendment would nonetheless be approved by the Civil Rules Committee and forwarded to the Court Administrator for implementation. To date, the Court Administrator has not amended Form 279.

Attorney Bjerke ceased using his altered version of Form 279, but continued to request credit reports at financial disclosure hearings. Judge Villa asked Attorney Bjerke "when this would be resolved."[4] Attorney Bjerke wished to continue to seek credit reports at financial disclosure hearings despite the Subcommittee report and the fact that the form and rule do not provide for it. He then developed and began using his "Notice," which was intended to be sent with the official hearing notice. Court staff of Chittenden Small Claims Court evidently advised Attorney Bjerke that Judge Villa approved of the use of the Notice, and that court staff would forward Defendant's Copy with the Form 279 motion. Attorney Bjerke then expanded the use of the Notice procedure (including the cover letter directing court staff to file it and forward it to defendants) in all cases in the firm's statewide practice, evidently without approval from or notice to other courts and judges.

Attorney Bjerke's explanation is essentially that he should not be sanctioned for a practice that Judge Villa required of him.

For a variety of reasons, the historical facts upon which Attorney Bjerke and the law firm rely fall short of showing reasonable compliance with Rule 11. The foremost problem with the

[3] Attorney Bjerke could not remember whether this comment was made on the record in a hearing, or in general conversation between hearings on a small claims hearing day, or in some other context.
[4] Again, Attorney Bjerke cannot recall whether the question was raised during a hearing or separately.

identified practices is that Attorney Bjerke undertook them without seeking permission, by motion, of this court or other courts and without any notice at all. Although he did take his request to the Civil Rules Committee after the First Motion and before the Second Motion, he had alternatives with respect to individually filed cases.

For example, there are motions he could have filed within the framework of Rule 13, such as (a) to alter Form 279 for the purpose he desired, (b) to request that the court clerk forward his proposed "Notice to Defendants" with Form 279, or (c) to request that the court order access to credit reports at the financial disclosure hearing. The defendant and the court then would have been aware of his request, and could have been prepared to address the procedural and legal questions involved. A ruling on any of these motions would have been clear, and subject to appeal so that he could have obtained a definitive ruling.

Alternatively, he could simply have chosen not to seek access to credit reports at financial disclosure hearings, and filed such requests as part of a motion for a hearing on contempt because of nonpayment following the financial disclosure hearing. Under V.R.S.C.P. 8(a), "If a judgment debtor fails to comply with a payment order issued as a result of a financial disclosure hearing, the judgment creditor may file a written motion for civil contempt with the court clerk." There is no requirement that the motion be on an official court form, as there is for a financial disclosure hearing. Thus, there is no restriction as to the content of the motion, or form of relief requested.

Thus, his explanation that 'the other judge made me do it' is not sufficient. First, Judge Villa did not require him to seek credit reports at financial disclosure hearings. It was only because he wished to do so that the issue of notice to defendants arose. Moreover, he could have advanced a request for credit access without deceiving this court and the defendant, or engaging the court on his behalf to unwittingly mislead the defendant into thinking that his actions had the court's approval.

That one judge in one court may have approved a particular practice on an informal basis creates no authority for Attorney Bjerke to use the practice in other courts and cases, particularly in view of a specific rule requiring the use of only the approved court form, and particularly after a Civil Rules subcommittee had interpreted that rule to prohibit the practice. Attorney Bjerke points to the efficiency of treating all his cases the same so that his staff of paralegals can be trained to engage in routine procedures consistent with his automated form of practice, but Attorney Bjerke's interest in maintaining consistent statewide practices is a business interest; it does not supersede each judge and court clerk's duty to apply proper law and procedure to each individual case, and to treat all parties the same. Moreover, under Rule 11, Attorney Bjerke's first obligation is to the court.

Attorney Bjerke argues that in the use of the Notice in the Second Motion, he has not altered the Form 279 itself. Rather, he argues that he has simply supplied a disclosure of his intentions in the form of an "attachment," not an alteration. This is a semantic distinction only. He intended for it to be mailed to the defendant along with the motion, and asked the court to do so. He labeled each of the two copies as "Court's Copy" and "Defendant's Copy" in the manner in which court forms, including Form 279, are labeled. The message conveyed to the defendant

is that these are forms used as part of the approved court process. If not a supplement to Form 279, the Notice is a separate motion, in which case it is not signed as required by Rule 11(a) and not authorized under V.R.S.C.P. 4. It is either an alteration to Form 279 or a separate motion; it cannot be a freestanding "attachment," attached to nothing.

Attorney Bjerke has also characterized these practices as simply and purely creating a benefit for the defendants in that the practices provide notice whereas otherwise there would be no notice provided. This argument simply ignores what is deceptive about these practices, as detailed above. Defendants would have properly and more clearly received notice of Attorney Bjerke's intentions if he had filed a written motion seeking the court's approval for these practices.

The opportunity to focus on this case has revealed substantive issues of law and procedure related to the case, and it is important to clarify how they are being treated as part of this decision. One such issue is whether the small claims court has subject matter jurisdiction to order access to credit reports. In its Notice of Conduct and Order to Show Cause, this court suggested that it does not.[5] Upon further reflection, there appears to be a valid legal issue.

While small claims court is part of the superior court, which is the court of general jurisdiction, it was moved to the superior court not long ago from the district court, which was a court of limited jurisdiction as to civil matters. The small claims court itself has circumscribed jurisdiction, yet it is now part of the superior court. At this time, most small claims cases are not heard by the presiding superior court judge, but by Assistant Judges, who may not be attorneys, or attorneys on ad-hoc per-diem assignments. In addition, most defendants are unrepresented. Thus, although the superior court is a court of general jurisdiction, small claims cases usually are not heard by general jurisdiction judges, and the parties may not have the knowledge or resources to raise or fully brief all the legal issues that a case may entail. Reflecting these realities, for example, witnesses at small claims trials are examined primarily by the judge, not the parties, V.R.S.C.P. 6(a), and motion practice is severely limited, V.R.S.C.P. 4. The result is that defendants are unlikely to raise legal issues over procedure, and the judge may not get the desired benefits of the adversarial process such as briefing and argument on legal issues.

Whether the small claims court has subject matter jurisdiction to issue orders under 9 V.S.A. § 2480e(a)(1) is a good question that should not be decided definitely in the context of a Rule 11 proceeding. Legal Aid characterizes the assumption that requests for these orders fall within the subject matter jurisdiction of the small claims court as "questionable," but did not address the issue further. Memorandum of Law of Amicus Curiae Vermont Legal Aid, Inc. at 7, filed Feb. 10, 2007. Thus, at the beginning of the hearing on February 5, the court clarified that despite the contents of the Notice of Conduct, the court would assume, in Attorney Bjerke's favor, that there is a valid argument for the position that the small claims court does have such subject matter jurisdiction, and therefore this would not be the basis for a Rule 11 violation.

Similarly, there is a second question as to whether, even if the small claims court has subject matter jurisdiction, it is limited by statute or rule from considering requests as made by

[5] "Attorney Bjerke should be well aware that the relief he suggests he may request is not even within the subject matter jurisdiction of the small claims court to order." Notice of Conduct and Order to Show Cause, page 2.

Attorney Bjerke for orders for access to credit reports at the financial disclosure hearing stage of proceedings. This court suggested in the Notice of Conduct that there was such a limitation.[6] Again, upon further consideration, it appears that this presents an unresolved legal issue.

Legal Aid argues that the rules clearly proscribe any request for credit report access prior to a contempt hearing, and that it is improper for Attorney Bjerke to make any request at a financial disclosure hearing for any information other than income, expenses, and assets. The argument is that such a request is premature under the sequential framework established by the rules: only if the judgment debtor does not pay *after* the court's determination of ability to pay at the financial disclosure hearing may a judgment creditor make a request for access to credit reports. In other words, if such requests are allowable in small claims court at all, they are only permitted in a motion for contempt. Attorney Bjerke argues that 12 V.S.A. § 5537(c) authorizes such requests at financial disclosure hearings: "Rights granted in this section to judgment creditors are supplemental to other rights and procedures created by other statutes and rules." Accordingly, because there appear to be arguments on both sides of this issue, the court clarified at the beginning of the hearing on February 5 that despite the apparent conclusion on this issue in the Notice of Conduct, the court would assume, in Attorney Bjerke's favor, that there is a valid argument for the position that he has taken on this issue, and it would not be a basis for a Rule 11 violation.

Another legal issue about which there may be some debate derives from the language of 9 V.S.A. § 2480e. Section 2480e is a part of the Consumer Fraud Act, 9 V.S.A. § 2451–2480n, and is plainly intended to protect the confidentiality of a consumer's credit report, not to make a consumer's credit report readily available to judgment creditors. Accordingly, section 2480e bars anyone from obtaining a credit report except with the consumer's consent, 9 V.S.A. § 2480e(a)(2), or "in response to the order of a court having jurisdiction to issue such an order," 9 V.S.A. § 2480e(a)(1). The question is what level of showing or proof must a judgment creditor make in order to obtain such an order? Is a simple request sufficient, or does the provision require some standard of proof to be met? The alterations used by Attorney Bjerke could easily suggest to an unrepresented, unsophisticated judgment debtor that a request made by a judgment creditor will be granted if the debt is unpaid, without any additional showing. Again, this is a legal issue about which there could be reasonable debate. Therefore, on this issue, as on the two previously identified, the court stated on February 5 that, since there are various valid arguments, the court will not assume a specific legal conclusion on this issue and will not base a Rule 11 violation on any such legal conclusion.

These legal issues are thus not directly before the court at this time and the court will not rule on them, nor use any conclusions about them as a basis for finding a Rule 11 violation. It is noted, nonetheless, that a significant problem with the manner in which Attorney Bjerke chose to proceed—altering forms rather than filing motions to request relief or rulings—is that these legal issues had little chance of being addressed directly by the court, much less by a general jurisdiction judge. Rather, Attorney Bjerke's positions on these issues were simply assumed in

[6] "Generally, motion practice in small claims court is severely limited by V.R.S.C.P. 4. All motions in small claims court must be in writing, *id.*, and nothing in the small claims rules permits any type of "request" for access to a judgment debtor's credit report at a financial disclosure hearing." Notice of Conduct and Order to Show Cause, page 2.

the procedures that he enlisted the court to use for the benefit of his clients, and the altered forms suggested to the defendants that they were approved by the court as settled law. Because most small claims defendants are unrepresented, the chances of these issues being raised by defendants and receiving a full airing before the court were minimal.[7] The experience that numerous small claims defendants have with the process, however, informs their perceptions of the fairness of the judicial process in general and their views on the impartiality of the courts.

Although the court will not hold conclusions on the legal issues against Attorney Bjerke in this proceeding, the improper use of court forms, done in violation of court rules and done in a deceptive manner that results in misleading defendants as to the state of the law, does support the conclusion that the altered forms in both the First and Second Motions were presented to the court for an improper purpose. See V.R.C.P. 11(b)(1). Specifically, Attorney Bjerke sought to bypass proper court procedure—filing a motion requesting court action—in favor of altering court forms in a deceptive manner. The legal issue he wished to raise was a legitimate one: whether the rules, which apparently prohibit a request for credit reports to be made at a financial disclosure hearing, are in conflict with a statute that specifically does not limit the remedies of a judgment creditor in post-judgment proceedings. As noted above, Attorney Bjerke could have filed a motion under Rule 13 to have this issue addressed properly. He still may.

The deception was that he altered the forms in a manner that was likely to evade judicial attention, which it did, and furthermore he created for defendants the false impression that requests for orders under 9 V.S.A. § 2480e(a)(1), even if within the small claims court's jurisdiction, are considered by the court to be properly raised at a financial disclosure hearing, notwithstanding the plain language of the rules. The impression is also created that they will be routinely granted at such hearings.

By altering the court form in the ways he did, he created apparent judicial authority for his position, thereby conveying to defendants a message that a judgment creditor has permission to seek credit reports at financial disclosure hearings as a matter of law. He borrowed the court's authority by speaking in its voice on its forms, using messages that assume the legal conclusions that he advocates but that are neither settled law nor legal conclusions that the court has reached.

Other aspects of the Notice terms are troubling. In the second paragraph, defendants are informed that they may make their financial disclosure by telephone. This technically could refer only to the scope of disclosure on the court form (income, expenses, etc.), but Attorney Bjerke described the process that occurs in his firm when debtors call. There is a script paralegals use, and it includes asking for telephone consent for access to credit reports, which goes beyond the scope of disclosure on the court form. The Notice, as an altered court form, thus plays a role in leading debtors down a path toward consent to credit report disclosure that the court does not endorse. Secondly, the Notice states that if telephone disclosure is satisfactory, the Plaintiff's attorney may cancel the hearing. More accurately, the Plaintiff's attorney may withdraw the motion; hearings are only "cancelled" by the court itself. This use of language subtly suggests an influence over the court process that may aid Attorney Bjerke and his firm in obtaining results in debt collection cases, but is inconsistent with the court's

[7] The odds of an unrepresented small claims defendant recognizing these practices as Rule 11 violations are still less likely.

obligation and commitment to impartiality. It is not a message this court wishes to convey on documents that appear to be court forms.

Legal Aid, in its amicus brief and at the hearing, identified other ways, not included in the court's Notice of Conduct, that it argues that Attorney Bjerke's conduct violated settled law. In its view, the altered court form and the Notice patently violate 9 V.S.A. §§ 2451a and 2453(d) of Vermont's Consumer Fraud Act and the related regulations of the Attorney General. For example, Regulation 104.04(g) defines the following as an unfair debt collection practice:

> The use, distribution, or sale of any written communication which simulates or is falsely represented to be a document authorized, issued or approved by a court, a governmental official, or other governmental authority, or which tends to create in the mind of the ordinary debtor a false impression about its source, authorization, or approval.

Legal Aid also argues that these practices violate the Vermont Fair Credit Reporting Act, 9 V.S.A. § 2480 *et seq*. and related regulations promulgated by the Attorney General. Legal Aid further argues that they violate the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692o, particularly § 1692e(9), which is similar to the regulation of the Vermont Attorney General described above, and which is specifically intended to protect "the least sophisticated consumer."

Attorney Bjerke argues that the intent of the federal statute is to prohibit debt collectors from creating a false impression in the minds of debtors that a legal case has actually been filed and there is a pending case in court when that is not true, and the debt collector uses the threat of an imminent judgment for its purposes. Legal Aid counters that the provisions of the statutes and regulation are not so limited, and cites the plain language of the Attorney General's regulation and two cases in which enforcement was based on less egregious conduct than that involved in this case.

Legal Aid also argues that when the firm acts on the basis of telephone consent by a consumer to credit report access, it is violating a regulation that requires consumer consent to be given in writing if the application for the credit at issue was made in writing. CF 112.03. Attorney Bjerke's argument to the contrary does not appear to be supported by the plain language of the regulation.

The court declines to base a finding of Rule 11 violation on these sources, even though Legal Aid's arguments are persuasive and the response of Attorney Bjerke and the law firm is not. These grounds were not included in the Notice of Conduct issued by the court, and although they were included in Legal Aid's pre-hearing memorandum, they were not the basis of the court's initiation of a Rule 11 hearing. In addition, the Rule 11 process is not an enforcement mechanism for substantive law violations, and appears not to be an appropriate proceeding in which to address applications of law related to the cited regulations and statutes. Finally, such grounds would be cumulative, as the court has already found a Rule 11 violation for the other reasons previously identified.

Sanctions

While compensation for expenses is a common sanction, there is no showing that a party has incurred expenses that call for compensation.

The paramount interest of the court is to prevent future conduct that is in violation of the rule. Rule 11(c)(2). A related interest is increasing the likelihood that those courts and committees that may be called upon in the future to address issues related to those of this case will be able to derive some benefit from this proceeding.

Accordingly, Attorney Bjerke and his firm are required, as sanctions, to send to the Chittenden Small Claims Court (through the Chittenden Superior Court Clerk), the Civil Rules Committee (through its Chair Attorney William Griffin), and to Court Administrator Lee Suskin a copy of this decision, as well as all the memoranda of law and attachments that have been filed in relation to this proceeding. The purpose is to alert those involved to issues and arguments, and not to compel any specific legal conclusions on the part of any other court or person.

As an additional sanction, the pending motion, filed on an improperly altered form, must be denied. It does not make sense to honor a request for court action made in the improper manner in which the pending motion was presented. While the plaintiff may file a new motion for a financial disclosure hearing, it will be required to file any new motion on the proper court Form 279, and pay a new filing fee. It is also authorized to file a motion under Rule 13 to raise the underlying legal issues identified in this decision.

ORDER

For the foregoing reasons,

1) As sanctions for the Rule 11 violation identified in this decision, Attorney Bjerke and the law firm shall undertake the action described above forthwith and certify to this court when that action has been accomplished; and

2) The pending motion for a financial disclosure hearing is *denied* without prejudice to refile a new motion on the terms stated above.

Dated at Montpelier, Vermont this 28th day of March 2007.

_____
Mary Miles Teachout
Superior Court Judge