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THE HISTORY AND PURPOSES OF RULE 11

REMARKS OF ROBERT L. CARTER*

My job this evening is to tell you about my view of the history of the amendment to Rule 11 and why it came into being. I think that it is fair to say that the 1983 amendment to Rule 11 is part of an effort to reduce delays and expenses in litigation, and to dam the flood of litigation that is threatening to inundate the courts. As you know, the Advisory Committee proposed the changes in Rule 11 as part of a package of changes. It was proposed that Rule 16 would be amended to speed cases along and reduce costs by broadening trial judges' case management powers.¹ Major changes in Rule 26 were suggested to enable judges to limit excessive discovery and to punish abuses.² The Committee proposed amending Rule 11 to deter the submission of frivolous or groundless pleadings and motions.³

The intent of Rule 11 as originally promulgated was also to deter frivolous actions.⁴ It required attorneys to certify that there were good grounds for their pleading. In addition, the Rule provided for the imposition of sanctions for violations. The Rule's provisions applied to motions and other papers through incorporation by reference in Rule 7.⁵ However, for reasons I will discuss in a moment, the old Rule 11 simply did not work. The new 1983 amendment was designed to put teeth into the old rule.

How did the Committee intend to sharpen Rule 11's bite? Primarily, in two ways. First, the new Rule clarifies the standard that the attorney or party who signs the papers must meet. The old Rule 11 did not explicitly cast on the signator any affirmative duty to investigate the claim. Read literally, the old Rule required the signator simply to read the pleading; if, after reading it, he or she could certify to the best of his or her knowledge, information and belief that there was good ground to support the pleading, no further inquiry was required.⁶ The 1983 amendment does require inquiry beyond the four corners of the pleading. It explicitly places on the signator an affirmative duty to investigate the

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1. See Fed. R. Civ. P. 16 advisory comm. note; Vairo, *Analysis of August 1, 1983 Amendments to the Federal Rules of Civil Procedure*, in ALI-ABA, 1 Civil Practice and Effective Litigation Techniques in Federal and State Courts 59 (Aug. 1985 ed.).

2. See Fed. R. Civ. P. 26 advisory committee note.

3. See *Westmoreland v. CBS*, 770 F.2d 1168, 1174 (D.C. Cir. 1985); Fed. R. Civ. P. 11 advisory comm. note; Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1648 (1981); Vairo, *supra* note 1, at 61; Letter from Walter R. Mansfield, Chairman, Advisory Comm. on Civil Rules, to Judge Edward T. Gignoux, Chairman, and Members of the Standing Comm. on Rules of Practice and Procedure (Mar. 9, 1982) [hereinafter cited as Mansfield Letter], *reprinted in* 97 F.R.D. 190, 192 (1983).

4. See Fed. R. Civ. P. 11 advisory comm. note.

5. See Fed. R. Civ. P. 11 & advisory comm. note; Vairo, *supra* note 1, at 61.

6. See Fed. R. Civ. P. 11, 28 U.S.C. app. 540, 540-41 (1982).

facts and the law before certifying them.⁷

The affirmative duty to investigate, however, should not really be considered an innovation because the courts have always interpreted the old Rule to impose such a duty. As early as 1939, federal courts were speaking of a lawyer's general duty of investigation.⁸ By the time the amendment was proposed in 1981, it was well settled that an attorney had to satisfy himself or herself that there were good grounds for the pleading.⁹

However, the *extent* to which an attorney had to investigate the prima facie validity of the claims he or she was asserting in the pleadings was not well settled under the old rule. There were really two questions here: First, precisely what did the attorney have to believe, and second, how sure did he or she have to be?

The old Rule provided only vague answers. Precisely what did the attorney have to believe? That there was "good ground" to support the pleading. But it was not clear what "good ground" meant. The source of the phrase was an 1838 treatise on equity pleading by Joseph Story.¹⁰ Justice Story traced the rule that counsel must sign bills in equity back to the time of Sir Thomas More, and wrote that the purpose of the rule was to secure the guarantee of counsel "that upon the instructions given to them, and the case laid before them, there is"—and here is the phrase—"good ground for the suit in the manner, in which it is framed."¹¹ Justice Story's view that pleadings had to be signed to certify their good grounds was incorporated into the Equity Rule of 1842. The 1842 Rule was replaced by the substantially similar Equity Rule of 1912, which served as the source for the Rule 11 provision.¹²

The upshot of all this is that the phrase "good ground" was not defined when it was first used in 1838, and it remained a rather loose standard throughout the years. Left particularly vague in Rule 11 was whether "good ground" referred only to the factual assertions in the pleading, or whether the signator had to certify the legal claims as well. Courts that faced the issue tended to imply a duty to certify both.¹³

Also unsettled under the old Rule 11 was the second question regarding the extent of the investigation required—how sure the attorney had to be before he or she could sign the pleadings. The language of the old rule did not require certainty; it asked only for the best of the attorney's knowledge, information and belief.¹⁴ Fairly quickly, courts interpreted

7. See Fed. R. Civ. P. 11 & advisory comm. note; Vairo, *supra* note 1, at 64.

8. See Nieman v. Long, 31 F. Supp. 30, 31 (E.D. Pa. 1939).

9. Miller v. Schweickart, 413 F. Supp. 1059, 1061 (S.D.N.Y. 1976).

10. J. Story, Commentaries on Equity Pleadings 50 (1832). On this point generally, see Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1 (1976).

11. J. Story, *supra* note 10, § 47, at 50.

12. See Fed. R. Civ. P. 11 advisory comm. note; Risinger, *supra* note 10, at 13.

13. See, e.g., Heart Disease Research Found. v. General Motors Corp., 15 Fed. R. Serv. 2d (Callaghan) 1517, 1519 (S.D.N.Y.), *aff'd*, 463 F.2d 98 (2d Cir. 1972).

14. See Fed. R. Civ. P. 11, 28 U.S.C. app. 540 (1982).

this to mean that an attorney could not certify a pleading if he or she affirmatively knew that the pleading was false.¹⁵ In 1961, the Southern District took the standard one step further, when Judge Bicks ruled in *Freeman v. Kirby*¹⁶ that it was possible to violate Rule 11 even if the attorney did not actually know the claim was false.¹⁷ In that case, the attorney decided to file a suit for fraud in the names of persons whom he had never met, at a time before he received the memoranda that he later claimed were the source of his grounds to support the allegations in his complaint.¹⁸

When the attorney did receive the memoranda, shortly before filing the complaint, he did not know who authored them, and did not inquire into their truth. If he had investigated, he would have learned that the memoranda were written by lawyers in another firm who, at the time of the writing, were not satisfied that any fraud had been committed, and who felt that all of the evidence was unreliable rumor and hearsay.¹⁹ So the attorney who filed the suit did not affirmatively know the allegations in his complaint were false, but he also did not make even the barest of inquiries. On this basis, Judge Bicks ruled that the attorney had violated Rule 11. Eventually, the courts came to settle on the subjective and rather nebulous standard of good faith.²⁰ So long as the attorney believed in good faith that there were good grounds, Rule 11 could not be invoked against him or her.²¹

The courts tended to find good faith rather easily. For example, it has been held that an attorney who relied solely on allegations in a Wall Street Journal article acted in good faith.²² Also, in the 1980 case of *Nemeroff v. Abelson*,²³ the Second Circuit ruled that as long as an action was not entirely without foundation, an attorney could not be held to have acted in bad faith.

Thus, the old Rule's standards for signing were neither precise nor strict. The amendments were designed to clarify and tighten the Rule's requirements. They do this by answering the same two questions in a different way. What does the attorney have to believe? That the pleading is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. This may not be any stricter than the old "good ground" standard, but it certainly is much more precise. It specifies that the attorney must vouch for both the facts and the law.²⁴

15. *E.g.*, *American Auto Ass'n v. Rothman*, 104 F. Supp. 655, 656 (E.D.N.Y. 1952).

16. 27 F.R.D. 395 (S.D.N.Y. 1961).

17. *See id.* at 397.

18. *Id.* at 398.

19. *Id.*

20. *See Westmoreland v. CBS*, 770 F.2d 1168, 1177 (D.C. Cir. 1985).

21. *E.g.*, *Nemeroff v. Abelson*, 620 F.2d 339, 350 (2d Cir. 1980).

22. *See In re Ramada Inns Secs. Litig.*, 550 F. Supp. 1127, 1133-35 (D. Del. 1982).

23. 620 F.2d 339 (2d Cir. 1980).

24. *See Fed. R. Civ. P. 11 & advisory comm. notes; Vairo, supra note 1, at 64.*

How sure, then, does the attorney have to be? The new rule still does not require certainty, but it requires certification to the best of the attorney's knowledge, information and belief *formed after reasonable inquiry*.²⁵ The amendment thus replaces the vague good faith formula with a reasonableness standard. As the Advisory Committee Note makes clear, reasonableness is intended to be a stricter and more precise standard than good faith.²⁶ It is expected that a greater range of circumstances will trigger violations of the new rule. The judicial inquiry will no longer focus on what the signator subjectively believed, but rather whether the signator's inquiry was objectively reasonable given time constraints, availability of facts, and so on.²⁷ A lawyer who certifies his or her pleadings in good faith but after an unreasonable investigation would have satisfied the old Rule 11, but would be subject to sanctions under the 1983 version.²⁸

Now, I said earlier that the amendment to Rule 11 was designed to reduce expense and delay in two ways. The first was to clarify the standard that attorneys had to meet before they could sign papers. The second, and I turn to this now, was to deter abuses by granting to the trial judges clear authority to impose sanctions for violations of the rule.

The old Rule provided for sanctions too, but for various reasons they were rarely invoked. Actually, the old Rule had two separate provisions regarding sanctions. Unsigned pleadings, or pleadings signed with intent to defeat the purpose of the Rule, would be stricken as sham and false. This was a pretty radical sanction: The client was made to suffer for the excesses of the attorney. The severity of this sanction caused a sort of judicial paralysis—judges were reluctant to impose the sanction even when attorneys violated the Rule.²⁹ The courts established a very high threshold for imposition of this sanction: A pleading could be stricken under Rule 11 only if it contradicted matters of public record,³⁰ or could be shown to be sham and false beyond peradventure,³¹ or if the plaintiff had no capacity to sue.³² According to a 1976 law review article,³³ since

25. See *Westmoreland v. CBS*, 770 F.2d 1168, 1177 (D.C. Cir. 1985); Fed. R. Civ. P. 11.

26. Fed. R. Civ. P. 11 advisory comm. note; cf. *Nemeroff v. Abelson*, 620 F.2d 339, 350 (2d Cir. 1980) (pre-1983 Rule 11 phrased in subjective terms; standard was one of "bad faith").

27. See Fed. R. Civ. P. 11 advisory comm. note; Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 24, col. 1; Vairo, *supra* note 1, at 65.

28. See Fed. R. Civ. P. 11 advisory comm. note.

29. See Fed. R. Civ. P. 11 advisory comm. note; see, e.g., *Blanchette v. Cataldo*, No. 78-2368-S (D. Mass. June 23, 1982) (available on LEXIS, Genfed library, Dist file) (court reluctant to impose sanctions); *Textor v. Board of Regents*, 87 F.R.D. 751, 754 (N.D. Ill. 1980) (same).

30. *Bertucelli v. Carreras*, 467 F.2d 214, 215 (9th Cir. 1972).

31. See *Child v. Beame*, 412 F. Supp. 593, 600 (S.D.N.Y. 1976) (citing *Murchison v. Kirby*, 27 F.R.D. 14, 19 (S.D.N.Y. 1961)).

32. See *Incomco v. Southern Bell Tel. & Tel. Co.*, 558 F.2d 751, 753 (5th Cir. 1977).

33. *Risinger*, *supra* note 10, at 34-37.

the Rule was promulgated in 1938 there have been only eleven cases resulting in findings of Rule 11 violations.³⁴ Of these, four were disposed of on other grounds, so that the propriety of the Rule 11 striking was not readily testable on appeal.³⁵ Of the remaining seven, the courts actually struck the pleadings in only two cases.³⁶ One case of striking was reversed on appeal,³⁷ and one case was ultimately successful.³⁸

The second provision in the old Rule was that the attorney could "be subjected to appropriate disciplinary action"³⁹ for a willful violation. The Rule did not specify what sort of discipline was contemplated, and this necessarily led to some confusion regarding the range of available sanctions.⁴⁰ Some courts implied from Rule 11 a power to impose court costs, including attorney's fees.⁴¹ This was often viewed as an application of the general rule that federal courts award counsel fees when the opposing side has initiated or conducted a suit in bad faith.⁴² Another sanction—contempt—was specifically mentioned as an available sanction in the May, 1936 preliminary draft of the Rule, but was omitted in the final report.⁴³ It was rarely imposed in practice. An even more drastic sanction, disbarment, was applied still more rarely. The only reported case of disbarment under Rule 11, for gross misrepresentation to the court, was reversed for lack of due process.⁴⁴

As the Advisory Committee Note stresses, abusive pleadings and discovery were often permitted under the old Rule because of both confusion over the range of appropriate sanctions and a perceived reluctance to impose any sanctions at all.⁴⁵ The amendment overcomes these problems in several ways. First, the word "sanctions" is added to the

34. *Id.* at 36.

35. *Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc.*, 61 F.R.D. 8, 10 (D.V.I. 1973); *Heart Disease Research Found. v. General Motors Corp.*, 15 Fed. R. Serv. 2d (Callaghan) 1517, 1519 (S.D.N.Y.), *aff'd*, 463 F.2d 98 (2d Cir. 1972); *Spencer v. Dixon*, 290 F. Supp. 531, 535 (W.D. La. 1968); *Nichols v. Alker*, 126 F. Supp. 679, 684 (E.D.N.Y. 1954), *aff'd*, 231 F.2d 68 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956).

36. No action was taken in two cases, and alternative sanctions were imposed in three others. *Risinger*, *supra* note 10, at 37.

37. *See Bertucelli v. Carreras*, 467 F.2d 214, 215 (9th Cir. 1972).

38. *See Freeman v. Kirby*, 27 F.R.D. 395, 399 (S.D.N.Y. 1961).

39. Fed. R. Civ. P. 11, 28 U.S.C. app. 540, 541 (1982).

40. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1334 (1969 & Supp. 1985); *Risinger*, *supra* note 10, at 14-17.

41. *See Textor v. Board of Regents*, 87 F.R.D. 751, 754-55 (N.D. Ill. 1980); *Driscoll v. Oppenheimer & Co.*, 500 F. Supp. 174, 175 (N.D. Ill. 1980); *Folding Cartons, Inc. v. American Can Co.*, No. 76-C-1113 (N.D. Ill. June 16, 1980) (available on LEXIS, Genfed library, Dist file); *cf. Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F. Supp. 975, 982-83 (E.D. Pa. 1973) (court awarded attorneys' fees on Rule 11 motion). *But see Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14, 19-20 (S.D.N.Y. 1980) (court refused to grant attorney's fees under Rule 11).

42. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-67 (1980).

43. *See* 5 C. Wright & A. Miller, *supra* note 36, § 1331.

44. *See In re Lavine*, 126 F. Supp. 39, 51 (S.D. Cal.), *rev'd sub. nom In re Los Angeles County Pioneer Soc'y*, 217 F.2d 190 (9th Cir. 1954).

45. Fed. R. Civ. P. 11 advisory comm. note.

caption to alert practitioners to the provisions within the Rule. The trial judge's power to award costs and fees is made explicit, and some sort of sanction is made mandatory—the Rule states that the court “*shall*”⁴⁶ impose sanctions, in place of the old rule’s “*may*”⁴⁷ impose sanctions. The new Rule also makes it explicit that either the attorney or the client, or both, can be punished.

The new Rule deletes the willfulness requirement, making it easier for judges to impose sanctions. However, the Advisory Committee Note adds that the court should take account of the party’s presumed or actual knowledge when considering the nature and severity of sanctions.⁴⁸ The new Rule also deletes the awkward provision allowing for the striking of pleadings. Of course, pleadings can still be stricken under Rules 8, 12 or 56. In short, the new Rule makes the threat of sanctions more credible, in order to deter the submission of groundless pleadings.

When the Advisory Committee sat down to review the old Rule 11, they noted several important weak points.⁴⁹ The Committee introduced various new provisions to strengthen Rule 11. Some were designed to introduce substantive changes. Others were intended merely to codify the gloss that judges had put on the old rules since 1938. But even in the latter cases, everyone’s awareness of the Rule could be increased and the Rule’s policy of deterrence furthered, by explicitly stating the duties and available sanctions. To the extent that the amendment has served this warning function, and certainly to the extent that the amendment calls for new higher standards, it is a significant step toward reducing unnecessary costs and delays in litigation.

46. Fed. R. Civ. P. 11 (emphasis added).

47. Fed. R. Civ. P. 11, 28 U.S.C. app. 540, 541 (1982).

48. Fed. R. Civ. P. 11 advisory comm. note.

49. *Id.*