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The Actual Operation of Amended Rule 11

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*REMARKS OF KEVIN THOMAS DUFFY**

Hello. I have been asked to respond to the Magistrate. I barely know the Magistrate and I have declined to respond to him. Under the circumstances your Committee has requested me to pick a fight with everybody in sight, and I agreed.

One of the reasons for Rule 11 is to get rid of the stupid, senseless, baseless lawsuits brought not by pro se litigants but by lawyers.¹¹² Everybody agree to that? I think so. Why do lawyers bring stupid, senseless, baseless lawsuits? Because they get away with it. The organized bar itself is supposed to watch out for the activities of lawyers. Has the organized bar met its own requirements? Are lawyers still bringing stupid, senseless, baseless lawsuits? Sure.¹¹³ Why aren't they disbarred? Well, they are not, and it is quite obvious to the judiciary that if the organized bar is not going to clean its own house then somebody has got to do something about it. Isn't it nice of the organized bar to say, "Hey we have got a problem, let's pass it off to the judiciary. Once they start doing something about it, let them, then we can complain about them doing something else." Maybe.

Rule 11 is not intended to terrorize people into not bringing lawsuits which have some merit, any kind of merit.¹¹⁴ Rule 11 is intended to terrorize unethical lawyers bringing baseless lawsuits.¹¹⁵ What is so wrong with that? Are you guys here tonight to protect them? I don't think so. What I suggest to you is that Rule 11 is not such a terrible thing. I hear these statistics. I don't know how many cases you went through, Professor Vairo, say 200? How about it? About 200. Those 200 cases are the ones, I am sure, which are reported in the Federal Reporter, Lexis and Westlaw. Am I right? One hundred fifty District Court cases. Now, how many cases did you or anybody else dig out of the files of the District Court where the District Judge just flipped over the papers and wrote, motion denied, so ordered, and signed his or her name. Not many, I will bet you that. Why? They are not reported. Why should they be reported? You people are paying more money annu-

* Judge, United States District Court for the Southern District of New York.

112. Rule 11's prohibition on baseless pleadings is in fact applicable to both represented and pro se parties. *See* Fed. R. Civ. P. 11 advisory comm. note. In both cases, the standard of review is identical. *See id.* In the case of an unrepresented litigant, however, it is within the court's discretion to consider the "special circumstances that often arise in pro se situations." *Id.* In general, the rules of pleading are liberally construed in actions involving pro se litigants. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Schwarzer, supra* note 77, at 201 ("violations by persons appearing pro se must be judged differently from those of lawyers").

113. In the past, Rule 11 has not been effective in deterring frivolous lawsuits. Fed. R. Civ. P. 11 advisory comm. note.

114. *See id.* ("[t]he rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories").

115. *See Westmoreland v. CBS*, 770 F.2d 1168, 1180 (D.C. Cir. 1985); *Taylor v. Belger Cartage Serv.*, 102 F.R.D. 172, 181 (W.D. Mo. 1984).

ally on buying a library than the people of the United States pay me on a yearly basis. Why should you buy a lot of other books which say motion denied? Of course they are not reported. You are going to see in the reporters those cases where the motions are granted.

I hear that the motions are brought, more motions are brought in the metropolitan districts.¹¹⁶ I hear a suggestion that the judges in the metropolitan districts therefore are more attuned to the fact of people bringing baseless lawsuits.¹¹⁷ Motions, the last time I looked, are not brought by district court judges. Motions are brought by lawyers. If there are more motions brought in the metropolitan districts, then I assume that at least some segment of the bar is sick and tired of baseless, senseless, frivolous lawsuits. Not that the courts are. But what have the courts been doing with them?

I must admit I heard something tonight which I want you to know right now does not apply, at least in my courtroom. If you come in on a settlement conference and tell me that your lawsuit is baseless and you walk out of the courtroom without being altered, you are lucky. I am having a bad day. All right? Now, I assume that Sy somehow has a kind of a priest-penitent privilege over the Eastern District towards St. Andrews for that matter. Look, you have cases, for example, where a guy wants in the worst way to bring his lawsuit in federal court and he lists all of the defendants and one of them happens to be a New York resident and he bolluxes up. Is Rule 11 intended to sanction people because of stupidity? I don't think so.¹¹⁸ But supposing he comes in and a judge says: "Hey fellow, you don't have jurisdiction, why don't you quietly fold your tent and go away?" And the fella says: "No judge, I like the idea of getting discovery under the federal rules and I am going to keep this lawsuit going." Fella is on his way out. You can be guaranteed of that. That is abuse of the entire litigation process. Litigation is not intended as a great game.¹¹⁹ I am astounded to find that people would consider it a great game. It is intended, believe it or not, to relieve the rub areas that people living on this planet feel because perhaps there are too many people living on this planet. We don't get rid of rub areas and we don't get rid of annoyances by bringing frivolous lawsuits.

What is wrong with the bar when I hear, and I hear, that there are cases where sanctions are applied against the client only?¹²⁰ What is

116. See Vairo, *supra* note 1, at 74.

117. See *supra* notes 87-92 and accompanying text (Remarks of A. Simon Chrein).

118. Mere negligence on the part of an attorney may result in sanctions under the amended Rule 11. See Vairo, *supra* note 1, at 70. The absence of bad faith, however, may be considered in the choice of which sanction to apply. See *id.*

119. See *McCandless v. Great Atl. & Pac. Tea Co.*, 697 F.2d 198, 201-02 (7th Cir. 1983) (discussing gravity of litigation and attorney's duty to forbear from frivolous legal proceedings).

120. See, e.g., *Friedgood v. Axelrod*, 593 F. Supp. 395, 398 (S.D.N.Y. 1984) (although court held plaintiff liable for excessive costs and attorney's fees under 42 U.S.C. § 1988 because plaintiff's action brought under 42 U.S.C. § 1988 was frivolous and in bad faith,

this? Personally I can't see Rule 11 having anything to do with that situation whatsoever. But, what is wrong with the bar when they say the client made me do it? I don't understand why there is this belief that the attorney-client privilege prohibits an attorney from defending himself against a sanction imposed against him personally. There are cases decided in the area.¹²¹ Did you know that? Have you looked? They are there.

I came here to discuss Rule 11. I actually find myself discussing things which are bigger than Rule 11. I find myself talking about your responsibility and mine. I don't have any easy answers. I don't think we are going to find any tonight. I know I could continue on however, for hours, but nobody would want me to.

the court found that the plaintiff's court-appointed attorney acted in good faith and did not deserve sanctions under Rule 11); *see also* *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (dictum) (sanctions may be imposed against an attorney and/or his client).

121. *Cf.* *Application of Friend*, 411 F. Supp. 776, 777 (S.D.N.Y. 1975) (this case, which arose before the enactment of Rule 11, stands for the proposition that an attorney is not subject to discipline for revealing a client's secrets and confidences when a criminal proceeding is pending against the attorney, even before he has been indicted. By analogy, such disclosures would also not be grounds for discipline in the context of a Rule 11 motion).