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Response to a Practitioner's Commentary on the Actual Use of Amended Rule 11

Charles Sifton

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REMARKS OF CHARLES SIFTON*

Well, I have the impression that part of this debate has been going on for years. This Rule has been around, as Judge Carter pointed out,¹³⁰ for an awfully long time, and it has had a lot of predecessors. I don't think it is the simple existence of this kind of rule that brings us here tonight, and I don't think this debate should be about whether lawyers can be improved by rules enjoining ethical conduct or whether judges should have tools like this with which to vent occasionally their passions against lawyers they don't like. That kind of issue has been the subject of debate for years without any significant result. What I think is interesting and, I take it, brings us together tonight is that it looks as if something is happening at present to this Rule that hasn't happened before. Not only it is occasioning conferences like this, but in some small measure the Rule is beginning to be enforced.¹³¹

I submit that it is being enforced in an effort to shift the cost, the crushing cost of litigation, in recognition of the fact that one of the injuries that can occur in this society is the injury that is inflicted by the receipt of one's own lawyers' bill. With that kind of injury clients are naturally going to look around for a remedy. They are going to ask their lawyer why do I have to put up with the kind of bill you are giving me to defend this lawsuit when you tell me the lawsuit is totally without merit?

Having said that, if only because it seems to remove some of the emotions and moral overtones from this debate, I'd like you to consider this Rule as if it had created a new cause of action for the tort of inflicting unnecessary litigation on someone. I think that is useful because, for one thing, you can compare it with the tort we have at present, the tort of malicious prosecution. Malicious prosecution is a tort that you can't even start to sue on until after you prevailed in some separate lawsuit.¹³² Maybe that is a good idea. Maybe that requirement of success in an earlier lawsuit would remove these problems of conflict between the attorney and his present client which have been mentioned by others.

The tort of malicious prosecution also requires a finding of malice, and there has been some suggestion in the discussion this evening that Rule 11 as well requires malice.¹³³ It doesn't, as I read the Rule; I suggest to you that judges are going to start reading this Rule rather carefully or

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

130. See *supra* notes 11-12 and accompanying text (Remarks of Robert L. Carter).

131. Vairo, *supra* note 1, at 74.

132. See *Worley v. Columbia Gas of Ky., Inc.*, 491 F.2d 256, 261 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974); *De La Cruz v. Du Fresne*, 512 F. Supp. 1204, 1205 (D. Nev. 1981); *Selas Corp. v. Wilshire Oil Co.*, 344 F. Supp. 357, 360 (E.D. Pa. 1972). One court has defined malicious prosecution as "an action in tort to recover damages for the institution, maliciously and without probable cause, of a suit which has terminated in favor of the defendant therein." *Tatum Bros. Real Estate & Investment Co. v. Watson*, 92 Fla. 278, 289, 109 So. 623, 626 (1926).

133. *Welsh v. Kinchla*, 577 F.2d 767, 769 (1st Cir.), *cert. denied*, 439 U.S. 983 (1978); *Williams v. City of New York*, 508 F.2d 356, 359 (2d Cir. 1974); *Skarbinski v. Henry H.*

they will be forced to read it rather carefully by clients looking for a remedy for the injury done them by their own lawyers' bills. As Judge Carter noted in referring to the opinion by Judge Bicks,¹³⁴ even in a situation where you act with the best of good faith, if you fail to make reasonable inquiry—in other words, if you are negligent—you have violated the Rule and opened yourself or your client up to some sort of shifting of the expense that you have caused as a result of your negligence. So, under this Rule it is not entirely a matter of bad faith, and it is not entirely an attack on your personal character for someone to ask for costs to be shifted under Rule 11. People of fine character fail from time to time to act as a reasonably prudent person would act under the same circumstances.

Another useful reason for considering this Rule as if it created a new cause of action is that it makes you think a moment about causation and about damages. One of the things that will happen if people start sitting down and determining what the expenses are that have been caused by the filing of a lawsuit is that you are going to add to this body of law which is growing up as to how much a lawsuit properly ought to cost and how much should somebody pay for a discovery motion. I think this is going to do everybody a lot of good. It is going to cause some consideration being given not only by the person who is being neglectful, but also by the lawyer who is defending the improperly brought lawsuit, of how much expense ought to be created for a client in defending the lawsuit. Does the client really need two lawyers to draft the papers or to appear in court when he may find himself eventually in a position where he can only recover the expense of one of those lawyers.

However, having said all of this, and to get to the anecdote that Mel Weiss suggested might be told pertinently in this context, there are and remain policy considerations separate and apart from the considerations warranting the shifting of the expense of unnecessary litigation from one side to the other—that is, that we want to keep our courts open to people with grievances,¹³⁵ even those who are mistaken on who is at fault. That is why we have limited ourselves to the tort of malicious prosecution in the past. I think we have to remember that, if we go from our present practice of having each party bear his or her own costs and move towards a situation in which it is all or nothing—you are either right or you pay for everybody's litigation expense—that you're going to work a significant change in the judicial system that we presently have. In this connection, I would suggest to you that, if you look at some of these

Krause Co., 378 F.2d 656, 658 (6th Cir. 1967); Pratt v. Bernstein, 533 F. Supp. 110, 118 (S.D.N.Y. 1981).

134. See *supra* notes 16-19 and accompanying text (Remarks of Robert L. Carter).

135. See *Kihneman v. Humble Oil & Ref. Co.*, 312 F. Supp. 34, 38 (E.D. La. 1970); *Levine v. Mills*, 114 A.2d 546, 548 (D.C. 1955), *aff'd in part, rev'd in part per curiam*, 233 F.2d 16 (D.C. Cir.), *cert. denied*, 352 U.S. 858 (1956); *Petrich v. McDonald*, 44 Wash. 2d 211, 217, 266 P.2d 1047, 1050 (1954) (quoting *Abbott v. Thorne*, 34 Wash. 692, 694-95, 76 P. 302, 303 (1904)).

other areas in which cost shifting is developing most rapidly—for example, in the civil rights area, where the prevailing party can recover from the other side,¹³⁶ and under the Equal Access to Justice Act,¹³⁷ where the litigant against the United States Government can recover the expenses of litigation where the government's position is not substantially justified—you will find that there has been remarkable tolerance for what you might call meritless litigation. This is right because we really have to leave the courts relatively open and shift this kind of expense according to standards applied with an eye towards the benefits of keeping the courts open.

This brings me to the anecdote I think Mel Weiss was talking about. I think it is the one about the pro se litigant who came into court, heard his adversary's position, and got so furious that during the recess he went out and pulled out a can of mace—this happened on the fourth floor of the Eastern District Court—and maced his adversary. The adversary, I am sure, would rather have responded to a frivolous argument in court than be attacked in this fashion. Or Mr. Weiss may be referring to something I keep on my desk, which is a yellowing copy of a *New York Times* article about a gentlemen who saw fit to resolve his complaint about employment discrimination at IBM by walking into their offices in Armonk, New York, and shooting everybody in sight. He may not have had a meritorious claim against his employer, but he sure was mad. I think it would have been better for an individual with that kind of feeling that he had been wronged to have him come into court and file a completely frivolous lawsuit. We should encourage that option rather than have people take the law into their own hands.

136. See 42 U.S.C. § 1988 (1982).

137. 28 U.S.C.A. 2412 (Supp. 1985).