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

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*REMARKS OF NAOMI REICE BUCHWALD**

First, Mel Weiss suggested that Rule 11 destroys the necessary cooperative atmosphere between counsel.¹³⁸ I think the question to be asked is the chicken and the egg question. Is the atmosphere destroyed before the motion is made or by the motion? I think that the reason that these motions are made more frequently in metropolitan areas¹³⁹ is simply because metropolitan areas are much more impersonal. I don't think it is the same in a small town. Further, I think this observation applies to all discovery sanction motions as well as other similar motions. Mel also suggested that the floodgates were going to open with respect to Rule 11.¹⁴⁰ There may well be more Rule 11 decisions, though I don't think the floodgates are going to open. First, I think that except for the wrongly decided decision in which Mel was involved,¹⁴¹ by and large Rule 11 decisions have been reserved for truly outrageous cases.¹⁴² It should never be forgotten that judges practiced in a sense in the old school,¹⁴³ and I think they have to be truly offended by what happens before they are going to go through the extra effort to add a Rule 11 decision onto the other decisions that they are already writing.

If you will bear with me, may I share with you a Supreme Court decision and the comments of some justices which accompanied a recent denial of certiorari.¹⁴⁴ The Supreme Court has a rule that reads, "[w]hen an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent the appropriate damages."¹⁴⁵ In denying this petition, three justices, the Chief Justice, Justice Rehnquist and Justice O'Connor, wanted to apply Rule 49.2 and four Justices, Justices Stevens, Brennan, Marshall and Blackmun, opposed application of the Rule. Both sides wrote and let me just, if I can, read to you a couple of sentences from the opinions for two purposes. First, to suggest that it

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

138. See *supra* notes 122-23 and accompanying text (Remarks of Melvyn I. Weiss).

139. A recent statistical study of Rule 11 cases found that the majority of district court Rule 11 decisions were from major metropolitan areas. See Vairo, *supra* note 1, at 74.

140. See *supra* note 126 and accompanying text (Remarks of Melvyn I. Weiss).

141. See *Goldman v. Belden*, 580 F. Supp. 1373 (W.D.N.Y. 1984), *vacated*, 754 F.2d 1059 (2d Cir. 1985).

142. See, e.g., *Felix v. Arizona Dep't of Health Servs., Goods, Vital Records Section*, 606 F. Supp. 634, 636 (D. Ariz. 1985) (plaintiffs' admiralty action to recover their original birth certificates held by the State of Arizona held to not "even arguably have a significant relationship to traditional maritime activity" and thus "so entirely frivolous and patently groundless" as to warrant Rule 11 sanctions); *McLaughlin v. Bradlee*, 602 F. Supp. 1412, 1417 (D.D.C. 1985) (because plaintiff "attempt[ed] to relitigate matters already adjudicated" imposition of Rule 11 sanctions was proper); *Heimbaugh v. City and County of San Francisco*, 591 F. Supp. 1573, 1577 (N.D. Cal. 1984) (plaintiff's claim that city police officers violated his first amendment rights and right to equal protection when they threw him off a hardball field because he was playing softball was "frivolous on its face" and therefore Rule 11 sanctions were justified).

143. Fed. R. Civ. P. 11 in its original form was adopted in 1937 and amended in 1983.

144. See *Talamini v. Allstate Ins. Co.*, 105 S. Ct. 1824 (1985).

145. Sup. Ct. R. 49.2.

is interesting to observe how the Supreme Court is handling this issue after they promulgated Rule 11, and also to perhaps suggest that it does not indicate that the floodgates are open. Those judges favoring the use of the rule stated:

Judicious use of the sanction of Rule 49.2 in egregious cases—and this is an egregious case—should discourage many of the patently meritless applications that are filed here each year. In the long run, this is the more effective way to “minimize the time devoted to the disposition of applications that are plainly without merit,” . . . after all, this is the whole purpose of Rule 49.2. Further, while freedom of access to the courts is indeed a cherished value, every misuse of any court’s time impinges on the right of other litigants with valid or at least arguable claims to gain access to the judicial process. The time this Court expends examining and processing frivolous applications is very substantial, and it is time that could be devoted to considering claims which merit consideration.¹⁴⁶

The opponents stated as follows:

Any evenhanded attempt to determine which of the unmeritorious applications should give rise to sanctions . . . would be a time-consuming and unrewarding task. It would require us either to adopt a procedure for assessing a fair compensatory damage award in particular cases, or to impose a somewhat arbitrary penalty whenever such a motion is granted. Unless there has been a gross abuse of the judicial process, or demonstrable and significant harm to a litigant, such action is unwarranted. . . . Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant’s claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. This Court, above all, should uphold the principle of open access.¹⁴⁷

This latter opinion is apropos of Judge Sifton’s story.¹⁴⁸ So I make the observation that the debate is not only going on in this room, it is still going on in the Supreme Court even though Rule 11 has been adopted.

And the final thing I would like to say is I think that much of what is happening with respect to Rule 11 is not known to any of the judges on this panel, because it is really happening in law offices. I am sure that there are many conversations between lawyer and client where a lawyer is explaining to a client that he simply cannot do what the client wishes him to do—that it would expose the lawyer to sanctions. I suspect that in those conversations the lawyer is quite grateful for the existence of the Rule. I also suspect that there are many situations where the plaintiffs voluntarily discontinue actions upon being confronted by a defendant with the facts and probably the threat of a Rule 11 motion. I suspect that there are also numerous motions that are never made.

146. *Talamini*, 105 S. Ct. at 1825.

147. *Id.* at 1827-28 (footnote omitted).

148. See *supra* text following note 137 (Remarks of Charles Sifton).

