

## A REFLECTION ON RULEMAKING: THE RULE 11 EXPERIENCE

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The experience with Rule 11 is a useful reminder of what we know but often forget about the effectiveness of law. It offers disproof of the nihilist view of legal texts sometimes voiced in the past by extreme legal realists or their successors among the Critics,<sup>1</sup> and also of the contrary belief sometimes voiced by Originalists and their positivist kin that the conduct of judges can be, should be, or generally is controlled by the commands of lawgivers, whoever they might be.<sup>2</sup>

The lawgivers who made Rule 11 were numerous. At all levels, they worked from a premise associated with the eighteenth century Enlightenment that the aim of civil adjudication is to apply the command of substantive lawgivers who make constitutions, statutes, and administrative rules to real events as best they can be perceived.<sup>3</sup> That is a very tall order, and procedure rules are therefore written in elastic terms crafted to leave the judges in any particular case free to do substantive justice unimpeded by unnecessary ceremonies; that add to the inevitable costs and delays of dispute resolution and distracts parties and judges from the correct goal.<sup>4</sup> Writing such rules is also a very tall, perhaps even a taller, order. Parties to

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1. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

2. See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 899 (2003).

3. See Paul D. Carrington, *Recent Efforts to Change Discovery Rules: Advice for Draftsmen of Rules for State Courts*, 9 KAN. J.L. & PUB. POL'Y 456, 456–57 (2000).

4. See FED. R. CIV. P. 1; Richard L. Marcus, *Slouching Toward Discretion*, 78 Notre Dame L. Rev., 1561 (2003).

disputes and their lawyers often do not want the law correctly applied to the true facts. In an enlightened world, therefore, it is necessary to have procedures that prevent cost, delay, subterfuge, and other depravities. But procedures designed to serve that benign purpose have a way of becoming themselves the instruments of cost, delay, subterfuge, and other depravities, as Rule 11 seemed to many to have done.<sup>5</sup> Alas, pity the poor procedural lawgivers whose work is forever the object of subversion by crafty professionals.

The 1983 version of Rule 11 was designed to address a perceived social problem—that there were too many civil proceedings and too much motion practice in federal courts and that this costly excess was the result of neglect, indifference, or misuse of procedure by counsel.<sup>6</sup> Whether there was or is in fact such a problem remains uncertain.<sup>7</sup> There had been an increase in civil filings in the decade of the 1970s, but much of it was explained by changes in substantive law, notably in the field of civil rights. A measurable increase in filings of contract disputes seemingly reflected an apparent tendency of businesses to take their disputes to court more frequently than they had in the past. This might be plausibly explained by the entrenchment in the third quarter of the twentieth century of the practice of business litigators to bill for their services by the hour, for this created a strong incentive to leave no stone unturned and no motion unmade.<sup>8</sup>

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5. See William W. Schwarzer, *Rule 11 Revisted*, 101 HARV. L. REV. 1013, 1017–18 (1998).

6. See Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1316 (1986).

7. See Marc Galanter, *The Life and Times of the Big Six; or the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921 (1988) [hereinafter *The Life and Times*]; Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 83–90 (1993); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109–12 (1996); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992). There is no doubt that there was a growing burden of asbestos cases, but that was not evident until about 1990. The senior author, Paul Carrington, will review the data in: *Premature Adjudication: Lessons from the Asbestos Crisis* (forthcoming).

8. See generally WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* (1996).

In addition to these realities, Corporate America perceived that it was being besieged by tort claims.<sup>9</sup> Very little evidence existed to verify this assertion, but the perception would lead to a series of reform initiatives, including the first President Bush's Competitiveness Council,<sup>10</sup> Senator Biden's Civil Justice Reform Act,<sup>11</sup> the Private Litigation Reform Act,<sup>12</sup> and numerous proposals still pending.<sup>13</sup>

Thus, whatever the realities or their causes, 1980 witnessed a perception growing in the minds of some federal judges and some corporate executives and their lawyers, of a problem in need of a solution that arose from the liberality and tolerance embedded in the 1938 Federal Rules.<sup>14</sup> Existing state law allowing suits for abuse of process and federal law seeking to deter vexatious litigation were widely deemed inadequate to discourage abuse of a system so flexible.<sup>15</sup>

The 1983 version was a response to those concerns. The Advisory Committee on Civil Rules of the Judicial Conference of the United States (Advisory Committee) crafted the rule.<sup>16</sup> The Standing Committee on Rules approved the Advisory Committee's recommendation and forwarded it to the Judicial Conference, which

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9. See *The Life and Times*, *supra* note 7.

10. The Council was established by Presidential decree on March 31, 1989, and headed by Vice President Quayle. The apex of its efforts at tort reform may have been the Vice President's address to the American Bar Association on August 13, 1991. For his account of his presentation, see DAN QUAYLE, *STANDING FIRM: A VICE-PRESIDENTIAL MEMOIR* 282-90 (1994).

11. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C. For an insightful account of the origins of that legislation, see Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 *STAN. L. REV.* 1393 (1994).

12. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, (codified as amended at 15 U.S.C. § 78u-4 (2000)).

13. For an apt account of the movement for procedural "reform," see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*, 78 *N.Y.U. L. REV.* 982 (2003).

14. See Georgene M. Vairo, *Rule 11 and the Profession*, 67 *FORDHAM L. REV.* 589, 592-93 (1998).

15. See THOMAS E. WILLGING, *THE RULE 11 SANCTIONING PROCESS*, 19-22 (1988).

16. See 131 *F.R.D.* 335, 338-41 (1990).

approved the rule and recommended it to the Supreme Court.<sup>17</sup> The Court promulgated the new rule in accordance with the Rules Enabling Act,<sup>18</sup> and Congress retained power to derail it by action taken within six months. Congress did not derail it, and so it became law on May 1, 1983. Throughout this lengthy process, the bar expressed limited interest.

It appears that the revised rule did have the effect of causing some lawyers to do a bit more preparatory work before filing a claim or motion in federal court.<sup>19</sup> While many lawyers told the American Judicature Society that they had counseled a client not to file suit in light of Rule 11, the impact on actual filings was not evident. The real effect of Rule 11 in that respect remains unknown. And how much additional cost to prospective defendants or to the judicial system was saved or borne because those cases were not filed or those motions not made is even more a mystery. In any case, the 1983 revision gave rise to a chorus of complaints.<sup>20</sup> Among these complaints were that the new rule: (1) gave rise to a new industry of Rule 11 motion practice adding to cost and delay; (2) stimulated incivility between lawyers; (3) was aimed at plaintiff's counsel, leaving defense counsel unrestrained in the assertion of unfounded denials; and, (4) encouraged judges to indulge their occasional personal animus toward individual lawyers, sometimes by belated *sua sponte* rulings coming after a dispute that seemed to have been resolved.<sup>21</sup>

The chorus steadily raised its voice. Rule 11 became a celebrated issue. That is something a good procedure rule should not become. Three excellent books by distinguished authors sought to

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17. *See id.*

18. 28 U.S.C. §§ 2071–2074 (2003).

19. *See* AMERICAN JUDICATURE SOCIETY, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, 68–72 (Stephen R. Burbank ed., 1989) [hereinafter AMERICAN JUDICATURE SOCIETY]; REPORT ON RULE 11 (E. Wiggins et al. eds., 1989) N.Y. State Bar Comm. on Fed. Courts, *Sanctions and Attorneys' Fees* (1987); WILLGING, *supra* note 15.

20. For an example, see Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1775 (1992) (referring to the 1983 revision as “the most controversial revision of the Federal Rules in their fifty-five year history”).

21. *See* Georgine M. Vairo, *Rule 11: Where Are We and Where Are We Going*, 60 FORDHAM L. REV. 475 (1991).

state or restate the law of Rule 11.<sup>22</sup> In addition, scores of law review articles were written. No other single procedure rule in the nation's history was ever given so much critical attention.

Investigators gathered an extraordinary quantity of empirical data to illuminate the use to which lawyers put the rule, but of course, the investigators could not detect—other than impressionistically—whether there were filings or motions deterred, or whether there were real net cost savings to the courts or parties.<sup>23</sup> The studies, excellent though they were, tended to illustrate a point made by Maurice Rosenberg, himself an empiricist and long a member of the Advisory Committee on the Civil Rules, who frequently affirmed that there are two kinds of empiricism in law: the sort causing lawyers to sniff that the obvious had been revealed, and the other causing lawyers indignantly to reject the conclusions as contrary to their experience.<sup>24</sup> One of the better studies suggested that the rule was working as intended to deter frivolous claims and motions, and that in the opinion of many lawyers posed no serious problems,<sup>25</sup> but one could not doubt that many lawyers were angered by the operation of the rule.

The Advisory Committee on the Civil Rules, together with the committee, sent out a call for comments on the rule.<sup>26</sup> A flood of comments were received, almost surely the largest supply of criticisms and suggestions in the fifty-odd years of the Committee's existence. The Committee deliberated for two years and came up with the compromise solution of the safe harbor.<sup>27</sup> A draft was circulated, and more comments were received. Hearings were held. Revisions were made in response to the comments. A draft was recommended to the Standing Committee. The Standing Committee

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22. GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (1989); JEROLD S. SOLOVY & CHARLES M. SHAFFER, JR., *RULE 11 AND OTHER SANCTIONS: NEW ISSUES IN FEDERAL LITIGATION* (1987); GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* (2d ed. 1995).

23. See AMERICAN JUDICATURE SOCIETY, *supra* note 19 at 95–96.

24. See Paul D. Carrington, *Maurice Rosenberg*, 95 COLUM. L. REV. 1901, 1903 (1995).

25. See AMERICAN JUDICATURE SOCIETY, *supra* note 19 at 75–76.

26. 131 F.R.D. 335 (1990).

27. See FED. R. CIV. P. 11(c)(1)(A) (providing that a party has twenty-one days from service of a motion for sanctions to correct the violation before the opposing party files the motion with the court.).

debated the draft at length and made further revisions. The Advisory Committee notes enumerated the reasons for yet another revision:

(1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel.<sup>28</sup>

The Standing Committee's revision was approved by the Judicial Conference and, in due course, promulgated by the Supreme Court, but not without a dissenting opinion by Justice Scalia.<sup>29</sup> The revision became law on December 1, 1993.<sup>30</sup>

Meanwhile, however, as these deliberations were nearing completion, the Supreme Court decided *Chambers v. Nasco, Inc.*,<sup>31</sup> In that case, the Court held that a district court has *inherent* power—in the absence of authorizing texts—to punish lawyers and their clients for persisting in the presentation of a frivolous, indeed fraudulent, defense.<sup>32</sup> It was observed that the conduct punished in that case included much that was not reached by Rule 11 because it was not reflected in pleadings or motions; nor was it entirely within

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28. Attachment B to Letter from Hon. Sam C. Pointer, Jr. to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure Chairman, Advisory Committee on Civil Rights 2-5 (May 1, 1992), *reprinted in* 146 F.R.D. 519, 523 (1993). For an exhaustive review of all changes and predicted ramifications, see also Georgene M. Vairo, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A. L. REV. 39 (1994).

29. FEDERAL RULES OF CIVIL PROCEDURE, *reprinted in*, 146 F.R.D. 507, 509 (1993) (Scalia, J., dissenting).

30. *See* FED. R. CIV. P. 11.

31. 501 U.S. 32 (1991).

32. *See id.* at 49.

reach of the contempt power.<sup>33</sup> The Court concluded that neither Rule 11 nor the statute forbidding lawyers to engage in vexatious behavior was applicable to much of the misconduct, but that this should not preclude a court from doing whatever it takes to prevent abuse.<sup>34</sup> The Court urged judges to use Rule 11 when applicable, but not to be constrained by it in necessitous circumstances.<sup>35</sup> In so holding, the Court relied in part on its earlier decision<sup>36</sup> upholding the power of the district court to dismiss a claim for failure to prosecute even though the defendant had made no motion to dismiss, notwithstanding the explicit language of FRCP Rule 41(b), requiring such a motion as a precondition to dismissal.<sup>37</sup>

The Civil Rules Advisory Committee laboring over the final draft of Rule 11 as the opinion in *Chambers* came down, was moved to ponder the question whether such rules are worth writing. If district courts are always free to do the right thing, why fuss over the text of mere procedural rules that will themselves be the subject of further disputation? It seemed for the moment that perhaps the legal nihilists had it right, that life tenured judges may and will do what they want unconstrained by mere words in legal texts.<sup>38</sup>

But the experience with Rule 11 does provide an answer to the unsettling question suggested by *Chambers*. The text of the 1983 version of the rule did serve to modify the behavior of judges in ways at least some of which were those intended by the lawgivers—and so did the 1993 version.

Professor Danielle Hart recently published an informative account of that experience.<sup>39</sup> She calls attention to several conflicts in the interpretation of the rule by United States Courts of Appeals. It seems that the courts of appeals are not in agreement on the urgency of the requirements stated in the rule—that a motion for

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33. *See id.* at 41–43.

34. *See id.* at 49–51.

35. *See id.* at 44.

36. *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962).

37. *See id.* at 630–31.

38. *E.g.*, Singer, *supra* note 1.

39. Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1 (2002).

sanctions must be made separately,<sup>40</sup> and the need for strict enforcement of the twenty-one-day safe harbor provision.<sup>41</sup> Additionally, disagreement exists as to the strict enforcement of the timing requirement applicable to motions under the rule.<sup>42</sup> Some courts have been more tolerant than others regarding compliance with the rule's provisions regarding the form of a court's Rule 11 order.<sup>43</sup> Finally, the courts of appeals have not applied the same standard in their reviews of sanctions orders, but have redefined "abuse of discretion" differently.<sup>44</sup> In these matters and others, Professor Hart found numerous intracircuit conflicts.<sup>45</sup>

These are, no doubt, imperfections in the text and in the administration of the rule.<sup>46</sup> They are, however, the kinds of imperfections we must expect in an enlightened system of judicial administration seeking to decide cases on the merits without unnecessary cost or delay and in accordance with a text intended to provide a structure to the process of dispute resolution without distracting the parties and the judge from the merits.

A specific concern regarding the 1983 version of the rule was that it was unevenly enforced with the substantive consequence that civil rights plaintiffs were disadvantaged.<sup>47</sup> There was some evidence that civil rights plaintiffs were somewhat more frequently the target of Rule 11 motions, and other evidence that when targeted, they were more likely to be sanctioned.<sup>48</sup> On the other hand, an explanation was tendered that the class of employment discrimination plaintiffs contain a higher than normal concentration of desperate or irrational claimants, reflecting perhaps the fact that the number of plaintiffs proceeding *pro se* is larger in that group than

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40. See, e.g., *Ridder v. City of Springfield*, 109 F.3d 288, 294 n.7 (6th Cir. 1997).

41. See, e.g., *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294, 298 n.3 (3d Cir. 1996).

42. See Hart, *supra* note 39, at 60–62.

43. See, e.g., *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92 n.2 (2d Cir. 1999).

44. See Hart, *supra* note 39, at 78–81.

45. *Id.* at 61–62.

46. Imperfection is, after all, the normal state of the law. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

47. See Nelken, *supra* note 6 at 1327.

48. See *id.*



most, and that their lawyers are often poorly informed because they have such limited early access to the evidence as it will appear at trial. It was also obvious that many lawyers representing civil rights plaintiffs are low on resources, and therefore more vulnerable to, and more intimidated by, the threat of sanctions.

To the extent that this uneven effect was a consequence of the 1983 rule, the modifications in 1993 that were intended to alleviate the problem included both the safe harbor provision protecting counsel from sanctions if the sanctionable filing is timely withdrawn after its defects have been pointed out by the adversary, and the preference for non-monetary sanctions. These protections did not completely protect the non-compliant party or counsel if the judge undertook to impose a sanction *sua sponte*.<sup>49</sup> It is not possible on the present state of our knowledge to say whether the problem for civil rights plaintiffs as perceived under the 1983 rule abides under the 1993 version.<sup>50</sup> Professor Hart perceives that the 1993 modifications are an insufficient remedy, and thus civil rights claims continue to be deterred.<sup>51</sup> As noted, they may be the category of civil cases most likely to be affected by any rule intended to deter the filing of unwarranted claims.

At the end of the day, there is no way to eliminate the possibility of uneven enforcement by a mere legal text, especially one written as a procedure rule that must, in the spirit of Rule 1, leave room for judges to do the right thing in light of the law and the facts as they are best able to perceive them. Necessarily, room to do the right thing must by definition allow some room for a judge to do the wrong thing. If Rule 11 were stricken altogether, the problem that some litigants appear to be treated differently from some others with respect to their procedural entitlements would be magnified. As *Chambers v. NASCO Inc.* affirmed, power and discretion would continue to reside in the judge and on a much larger scale.<sup>52</sup> But the discretion to impose sanctions on lawyers would even then not be unfettered, nor would there be an absence of legitimacy to the

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49. See FED. R. CIV. P. 11(c)(2)(B).

50. For thoughtful consideration of the issue, see Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155 (1999).

51. See Hart, *supra* note 39, at 117.

52. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991).

decisions so long as they were within a compass crudely fashioned from the reactions of appellate judges.<sup>53</sup>

As the Court in *Chambers* acknowledged, discretion to do the wrong thing can be cabined by an appropriate text.<sup>54</sup> This is so because most judges, most of the time, do not wish to present themselves as omnipotent, but seek the moral shelter afforded by their adherence to the commands of lawgivers. It is that impulse that gave rise to the institutionalization of the opinion of the court. In its 1938 form, Rule 11 afforded no such shelter for judges inclined to deter abuse. In its 1983 form, perhaps it afforded too much. Possibly, at least for this time and place, the 1993 version has it about right.

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53. For an exceptionally thoughtful reflection on the consequences of loosely crafted law, see Dorf, *supra* note 2.

54. See *Chambers*, 501 U.S. at 47.