3-16-1991

Discussion Paper: Does Federal Rule of Civil Procedure 11 as Implemented and Applied Exceed the Delegated Authority Granted by Congress

J. Clay Smith Jr.

Discussion Paper

DOES FEDERAL RULE OF CIVIL PROCEDURE 11 AS IMPLEMENTED AND APPLIED EXCEED THE DELEGATED AUTHORITY GRANTED BY CONGRESS?

J. CLAY SMITH, JR.*

Judicial philosophy may govern a decision to sanction a lawyer, the type of sanction or the amount of the sanction. Such discretion may have built-in bias and in some cases, a predisposition based upon prejudice. See ABA Judicial Canon 3. Now if a judge does not recuse himself or herself from a matter because of bias or prejudice, or if a judge does not recognize a predisposition as bias or prejudice, real mischief can be visited upon a civil rights lawyer, or any lawyer in a Rule 11 determination.

In the March issue of the American Bar Association Journal, Judge Myron H. Bright, a judge on the Ninth Circuit Court of Appeals, has written an article entitled, "Getting There: Do Philosophy and Oral Argument Influence Decisions," ABAJ 68 (March, 1991). The article does not deal with Rule 11 per se, but it is instructive because, as a result of a survey that he took from several judges on the outcome of a civil rights case, the range of

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* Professor of Law, Howard University School of Law. This is a discussion paper delivered at Georgetown University Law Center, on March 16, 1991, during a symposium sponsored by The Georgetown Journal of Legal Ethics on Contemporary Issues In Legal Ethics. The panel discussion was on "The Use And Abuse of Federal Rule 11." It was moderated by Professor Laura W.S. Mackin (Georgetown). Other participants included Professor Paul Carrington, (Duke), and Gregory P. Joseph (Fried, Frank, Harris, Shriver & Jacobson).

disagreement on how the case should have been resolved "was astonishing." I believe that if a survey were taken of 100 judges on civil rights cases where dollar and other Rule 11 sanctions have been applied, the extent of disagreement would be astonishing, also. I believe the survey would show much disagreement on the appropriate sanction, if any, in these civil rights cases, as Judge Bright found.

Many unspoken variables are naturally operative at the time of judgment under Rule 11. First of all the rule itself may be viewed as a prosecutorial as opposed to a remedial rule. How a judge views the rule will certainly be influenced by his or her judicial philosophy. A judicial philosophy of a judge to sanction may be influenced by the quality of the briefs, the skill of the lawyer to persuade, the status of the party, the status of the lawyers, the nature of the claim, the level of knowledge possessed by the judge, and many other variables. I think Judge Bright's survey on the outcome of a non-Rule 11 civil rights case is a red light to why more than the reasonable inquiry standard should govern, and why no less than a heightened scrutiny test should be applied as the standard for judicial review of civil rights-type cases under a Rule 11 sanction. As Judge Bright said, and it is a statement that merits more study, "judicial philosophy or viewpoint can make a difference in the result, even in a fact-oriented case." Id. at 71; see also, Do Judges Make a Difference, ABAJ 72 (March, 1991).

Perhaps it is a litigative metaphysical accident that a number of sanctions under Rule 11 have been adjudged against lawyers bringing civil rights claims. Maybe civil rights lawyers are inextricably caught in the middle of a debate among judges on whose judicial philosophy should be codified. Maybe federal judges simply are feeling the pinch of additional case loads resulting from the drug cases, and the asbestos litigation. See Labaton, Judges Struggle To Control A Caseload Crises, N.Y. Times, March 10, 1991, at E4, col. 5. Maybe we are just in an era where legitimate passive virtues, which influence judicial restraint, are now understood by some to mean something else: close the gates of access to the courts in civil rights matters. Is the threat of Rule 11 sanctions such a gate? I am making no charges against the judiciary, but there are a number of judges and scholars who are.

Critics of Rule 11 are in the ABA's Section of Litigation, who have voiced opposition against the rule because "empirical data supports [the] contention "that sanctions have been most heavily levied against civil rights plaintiffs." Staib, Critics Assail Rule 11, 16 Litigation 1, 6 (Feb., 1991).

Let me redirect my presentation to an inquiry at this symposium on Contemporary Issues In Legal Ethics: Are federal courts authorized by law to adopt the American Bar Association's Canons of Professional Responsibility as a codified standard for determining a Rule 11 violation?

Rule 83, FRCP authorizes each district court to make rules governing its practice not inconsistent with the Federal Rules of Civil Procedure, but like the Federal Rules, local rules of district courts must deal only with practice and must not affect substantive rights. See e.g., Sanders v. Russell, 401 F. 2d 241 (5th Cir. 1968) (Local rules prescribing the qualifications and the member of appearances of out-of-state attorneys was held invalid where, in contravention of congressional intent, its effect would be to preclude such attorneys from appearing in cases under the Civil Rights Act).

According to Professor Moore's Treatise on Federal Practice, ¶ 83.03, "A local rule may...impose sanctions for noncompliance with the local rules," presumably in instances that do not affect substantive rights. Where, in the Federal Rules of Civil Procedure has Congress authorized Federal Courts to adopt and to apply the substantive provisions of the ABA's Code of Professional Responsibility in the enforcement of Rule 11 sanctions?

It is my understanding, based on the "Historical Note" preceding the FRCP, that the rules and subsequent amendments do not take effect until the United States Supreme Court has first reported them to the Congress through the Attorney General, even though Congress pursuant to Title 28 U.S.C. 2072(a) has delegated to the Courts of the United States the power to adopt rules of

practice and procedure.

A respectable number of Rule 11 FRCP supporters assert that Rule 11 is based on the court's inherent power to discipline lawyers for unprofessional conduct and they point to the ethical standards of the ABA Canons of Professional Responsibility as the standard to discipline lawyers. In fact, the sanctions under Rule 11 appear solely related to the ABA Model Code of Professional Responsibility. What evidence is available to support this claim? A few examples make the point.

Local Rule No. 3 of the United States District Court of Montana states, "The Standards of professional conduct of attorneys...shall include the American Bar Associations Canons of Professional Ethics." Under the Montana District Court Rule "an attorney may be subjected to appropriate disciplinary action by the Court [f]or a willful violation of these Canons."

Local Rule 706 of the United States District Court for the District of Columbia does not specifically mention the ABA Code of Professional Responsibility. Rather, it recognizes "Violations of The Code of Professional Responsibility (as adopted by the District of Columbia Court of Appeals except as otherwise provided by specific Rule of this Court)."

Rule 5 of the United States District Court (Southern District

of California) states, "The standards of professional conduct of the members of the bar of this court shall include the current canons of professional ethics of the American Bar Association...."

Several other district courts have adopted, by local rule, the ABA Code of Professional Responsibility to discipline lawyers, and are issuing sanctions under powers granted by Rule 11, citing the ABA's Disciplinary Rules as the basis of their decision. See, e.g., J. Clay Smith, Jr., Federal Class Actions And Complex Litigation: Ethical Concerns 11, 15-17 (S.J.D. Diss., Geo. Wash. Nat'l Law Center, 1977) (local rules adopting ABA Canons of Responsibility prior to adoption of Rule 11). See also, Golden Eagle Distributing Corporation v. Burroughs Corp., 103 F.R.D. 124, 127-128 (N.D. Cal. 1984), revd 801 F. 2d 1531, 1539 (9th Cir. 1986). While the district court's decision in Golden Eagle was reversed, with the Ninth Circuit concluding that "Amended Rule 11 of the Federal Rules of Civil Procedure does not impose upon district courts the burden of evaluating ethical standards the accuracy of all lawyers arguments," the court specifically left undecided "the proper role of the courts in enforcing the ethical obligations of lawyers." Id. at 1542, 1539.[2]

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[2] Hence the Ninth Circuit left Local Rule 110-3, of the Northern District of California in place. The Local Rule, inter alia, incorporates by reference the Rules of Professional Conduct of the State Bar of California. Local Rule 110-3 is another variation of multiple Local Rules adopting or incorporating substantive ethical provisions as disciplinary devices in their Rules. Compare with United States v. Vague, 697 F.2d 805, 807 (7th Cir. 1983) ("'The judicial power is limited to deciding controversies...that is its function under the Constitution....,'"

The codification of the ABA's Model Code of Professional Responsibility as demonstrated by several Local Rules of district courts and the use of the Disciplinary Rules as grounds to levy sanctions under Rule 11, and the bases of such Disciplinary Rules as justifications for Rule 11, may violate the delegation doctrine announced in Sibbach v. Wilson, 312 U.S. 1 (1940). Sibbach announced that in 1934, when Congress empowered the Supreme Court of the United States "to prescribe, by general rules [of] practice," that such rules "shall neither abridge, enlarge, nor modify...substantive rights...." Id. at 7. (The same prohibition appears in 28 U.S.C. 2072(b)).

The question for debate is whether the ABA Code of Professional Responsibility as applied to Rule 11 sanctions violates the delegation doctrine because they affect substantive rights? It is arguable that these rules are substantive because they expose lawyers, and now, perhaps, indirectly a represented party, to substantive liabilities derived from the codified provisions of the ABA's Standards of Professional Responsibility, traditionally a function of state Law. See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 59 L.W. 4144, Feb. 26, 1991. (The reach of Rule 11 sanctions extend to nonlawyer citizens and nonlawyer-noncitizen clients). The answer to my

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quoting United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965)).

question may be directly inferred from Hanna v. Plummer, 380 U.S. 380 U.S. 460, 475 (1965)). There, Justice Harlan, concurring, stated, "To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether 'substantive' or 'procedural', is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation." Id. at 475.

I think Rule 11 exceeds the notion of federalism by empowering courts to adopt substantive rules governing human conduct for which there are state sanctions of general applicability, fairly applied to all persons within the profession regulated.[3] A lawyer is admitted to the Supreme Court of a state. It is the rules of the Supreme Court of state that should determine, or sanction the human conduct of a lawyer, upon notice by a federal court. This does not mean that a federal court cannot disbar a lawyer for failing to comply with a procedural rule, but the federal courts are not empowered to assess fines using substantive ABA Standards, or a substantive sanction provision hidden beneath procedural fog. Our

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[3] Nothing in this discussion should be construed as limiting the power of a federal court to decide independent claims (defenses) of discrimination against a local disciplinary bar body by civil rights lawyers, or political advocates, and the like, who can demonstrate that state law, or its application, past or present as been intentionally bias or disparate in its judgments. Coyle, Is Court's Fee Power Inherent? Nat'l. L. J., Feb. 25, 1991, at 3, 27, col. 1. United States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938).

constitutional system leaves such punishment to the appropriate disciplinary body of the state. Clearly, in the face of the Business Guides decision, judicial sanctions giving rise to disparate treatment as between a lawyer and a represented party(s) conceivably give rise to Due Process claims in law suits against judicial officers, an outcome, perhaps, not anticipated or foreseen by the Business Guides opinion.

I suspect that if the ABA Standards of Professional Responsibility are really substantive rules, touch substantive rights, or expose lawyers to substantive liabilities, derive from a substantive rule, then, it may be claimed that a major constitutional problem exists: Congress may not delegate to the courts the power to declare by rule the character of rights, duties or obligations, which if violated, are subject to fines under Rule 11 not in conformance with the Presentment Clause of the United States Constitution. I.N.S. v. Chada, 462 U.S. 919, 946, 952

(1983).[4]

The unlimited power of district court judges to sanction lawyers by fine under Rule 11, subject to less than heightened scrutiny[5] as a standard of judicial review, effects and alters the legal right, duties and relations of lawyers with their clients, their law firms, the local courts in their states and their insurance carriers. A heightened scrutiny standard of judicial review may not be a sufficient protection to save Rule 11 because a sanction amounting to a substantial fine, alone, could bankrupt a lawyer, drive him or her out of the profession, subject them to claims of malpractice by their clients, in addition to being exposed to public ridicule, all short of disbarment by a federal

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[4] At least one jurisdiction has stated that its Rules of Professional Conduct are "rules of reason. The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law (emphasis added) in general. [T]he Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations." Rules of Professional Conduct and Related Comments, Scope, at 4 (Adopted by Order of the D.C. Court of Appeals, March 1, 1990). See also, Eye On Ethics, The Washington Lawyer 28, 33 (Nov./Dec. 1990) (Rule 9.1 imposes on bar members duties of nondiscrimination in employment).

[5] J. Smith, Jr., E. Brown & L. Wilson, Rule 11 And Civil Rights Lawyers, Comments of National Bar Association In Response to the Call for Comments Issued by the Advisory Committee on the Civil Rules Judicial Conference of the United States, Nov. 1, 1990, at 2.

judge.[6]

The reach of Rule 11 to all who sign pleadings, motions and other court papers makes law "that will bind the Nation." [7] Bowsher v. Synar, 478 U.S. 714, 737 (1986) (Justice Stevens, concurring). Money sanctions against lawyers, and their clients under Rule 11, for the reasons stated, affect substantive rights and may not be exercised consistent with the separation of powers doctrine as established in our Nation's instrument of rule. Ibid; See Hanna v. Plummer, 380 U.S. 460, 475 (1964) (J. Harlan, concurring).

In conclusion, I believe that Rule 11 of the Federal Rules of Civil Procedure is a substantive Rule, and as promulgated by the United States Supreme Court exceeds the delegation authority granted by Congress.

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[6] Rule 11 is also said to "chill effect of vigorous representation of their clients." Hinerfeld, The Sanctions Explosion, California Lawyer 33 (Nov., 1987).

[7] This is apparent even more after the Business Guides decision.

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C. STEVEN TOMASHEFSKY

April 9, 1991

Professor J. Clay Smith, Jr.
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Dear Professor Smith:

Thanks very much for sending me a copy of your thought-provoking discussion paper on Rule 11. While I agree that a Rule 11 sanction certainly affects the sanctioned person's substantive rights, it is possible to draw a line between that and affecting the parties' substantive rights in the primary litigation. That is, if a plaintiff makes a contract claim, the Rule 11 sanction doesn't change the facts or the rules of decision governing resolution of the contract claim.

On the other hand, a sanction or the threat of a sanction may so distract or disable a party's attorney that the attorney cannot effectively represent his or her client. Particularly where a solo practitioner or small firm is required to pay the attorneys' fees accrued by a large firm, the fee-shifting may impose a cost amounting to commercial capital punishment.[1] But despite the obvious impact on the

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[1] The flip side of this situation is also a problem. If a sanctioned large firm or wealthy client is made to pay the low fees incurred by a solo practitioner with a low billing rate, the amount of fees shifted may be too small to impose a sting having any deterrent effect. If Rule 11 is to be truly deterrent, it should take into account the sanctioned party's ability to pay, like the assessment of punitive damages. But as far as I am aware, no court has accepted this approach and at least one appears to have rejected it. See Magnus Electronics, Inc. v. Masco Corp., 871 F.2d 626, 634 (7th Cir.), cert. denied, 110 S. Ct. 237 (1989).

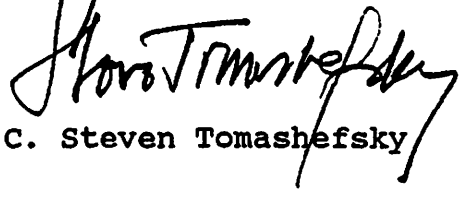
course of the litigation, the sanction again doesn't seem to change the rules of decision and, therefore, does not seem to me to violate the Rules Enabling Act.

A different Rules Enabling Act question was raised at the recent Rule 11 hearings before the Advisory Committee on Civil Rules. According to the Christiansburg Garment case, Congress has mandated a different standard for imposition of attorney-fee shifting as to civil rights plaintiffs and defendants. Rule 11 has never been construed to grant more leeway to civil rights plaintiffs. Arguably an even-handed interpretation of Rule 11 in civil rights cases conflicts directly with Congress' controlling mandate.

In other words, 28 U.S.C. § 1988 enacts a substantive law of fee shifting applicable to civil rights cases. Rule 11 may violate that substantive law if it does not abide by the statutory balance. Judges who are hostile to civil rights plaintiffs may use Rule 11 as a gap filler to shift fees that couldn't be shifted under Christiansburg Garment or § 1988. This seems to me a misuse of Rule 11, despite the differences in scope between the rule and the statute.

Thanks again for sharing your work with me. I will pass it along to the members of the Chicago Council of Lawyers Federal Courts Committee for their comment.

Very truly yours,



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April 4, 1991

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Dear Clay:

Many thanks for the note and the enclosure.

I am prone to agree that there is a potential conflict between sanctions rules and the Enabling Act. It is part of my job as Reporter to keep the Committee on the true path on that regard.

You might want to consider my point at Georgetown as you publish this piece. You are surely right that local rules extending Rule 11 can run afoul of the Enabling Act and it does not surprise me to learn that some local rules do precisely that. District courts enacting local rules are frequently unaware of the limitations on their powers in that regard. But excesses of that kind should be distinguished from any excesses of the Supreme Court in promulgating national rules. The local rules to which you refer may simply be invalid if they are not consistent with the national rule, or if they are "substantive."

There is a second point that strikes me as I re-read your remarks. There have been, for 200 years so far as I know, local rules bearing on admission and discipline of the federal bar. There have never been national rules on that subject. Mostly, those local rules piggy-back on state law, but not, I think, wholly. You might want to take a look at the general subject of admissions and de-admissions to some of the 94 district court bars. My belief is that there have been over the years occasional lawyers suspended or dismissed from the federal court bar as a result of their conduct in federal court, without there necessarily being any discipline imposed by state authority. But I have never checked that out.

I hope that these thoughts are helpful. Best wishes.

Sincerely yours,