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Foreword—Third Annual Fritz B. Burns Lecture on Rule 11 Reform: Progress or Retreat on Attorney Sanctions

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FOREWORD
THE THIRD ANNUAL FRITZ B. BURNS LECTURE ON RULE 11 REFORM: PROGRESS OR RETREAT ON ATTORNEY SANCTIONS?

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On April 8, 1994, the Fritz B. Burns Foundation and Loyola Law School sponsored a public lecture addressing significant recent amendments to Rule 11 of the Federal Rules of Civil Procedure regarding sanctions for frivolous litigation.[1] The principal speakers at this event were the Honorable William W Schwarzer, Senior Judge in the United States District Court for the Northern District of California and Director of the Federal Judicial Center, and Professor Georgene M. Vairo, Associate Dean of Fordham University School of Law. Both speakers have now prepared articles articulating their respective views regarding the new Rule 11.[2]

The now-discarded 1983 version of Rule 11 made sanctions mandatory when lawyers failed to satisfy an objective standard of reasonable inquiry into the facts or law underlying a claim.[3] This approach to sanctions represented a dramatic departure from the original 1937 version of Rule 11, pursuant to which sanctions could only be triggered by intentional or willful misconduct.[4] The 1983 amendments represented an effort to streamline the federal litigation process and unclog an increasingly jammed civil justice system.

While the 1983 version of Rule 11 appeared sensible on its face and had potential for alleviating some of the perceived abuses in the

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1. On December 1, 1993, extensive amendments to the Federal Rules of Civil Procedure went into effect. This included a major revision of the 1983 version of Rule 11. *See* FED. R. CIV. P. 11, Proposed Amendments to the Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D. 401, 419-24 (1993).

2. *See* William W Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7 (1994); Georgene M. Vairo, *Rule 11: Past As Prologue*, 28 LOY. L.A. L. REV. 39 (1994).

3. FED. R. CIV. P. 11, *reprinted in* 97 F.R.D. 165, 197 (1983).

4. For discussions of the original version of Rule 11, see Robert L. Carter, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 4, 4-9 (1985); Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 503-06 (1986).

federal courts, judicial application of the Rule precipitated considerable commentary and criticism. The most frequent complaints included concerns that the 1983 version of Rule 11 chilled creative advocacy, particularly in the area of public interest litigation.[5] Further, critics noted that the Rule spawned time-consuming satellite litigation,[6] created improper fee shifting,[7] and contributed to a rising tide of incivility and acrimony among lawyers and between bench and bar.[8] In short, many argued that the cure was far worse than the disease.

The December 1993 amendments to Rule 11 represented a major effort to address the foregoing concerns about the harshness and deleterious impact of the 1983 rule. For example, the new Rule 11 makes sanctions for violation of its provisions discretionary rather than mandatory.[9] In addition, the Rule now contains a "safe harbor" pro-

5. *See* Edward Greer, *Rule 11: Substantive Bias in Formal Uniformity After the Supreme Court Trilogy*, 26 NEW ENG. L. REV. 111, 117-25 (1991); Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331, 333-34 (1988); Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TUL. L. REV. 1033, 1043-54 (1993); Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 393-94 (1990); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1338-52 (1986); Kenneth F. Ripple & Gary J. Saalman, *Rule 11 in the Constitutional Case*, 63 NOTRE DAME L. REV. 788, 788-89 (1988); Morton Stavis, *Rule 11: Which is Worse—The Problem or the Cure?*, 5 GEO. J. LEGAL ETHICS 597, 606-08 (1992); Mark S. Stein, *Of Impure Hearts and Empty Heads: A Hierarchy of Rule 11 Violations*, 31 SANTA CLARA L. REV. 393, 413-14 (1991); Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429, 429 (1992); Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 106-27 (1991); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 489-508 (1988-89); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 483-86 (1991); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-01 (1988).

6. *See* George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5, 6, 13-14, 17 (1991); Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 636-38 (1987); William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017-18 (1988).

7. *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1947 (1989); Judge Sam D. Johnson et al., *The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions*, 43 BAYLOR L. REV. 647, 656 (1991).

8. *See* Alex Elson & Edwin A. Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 365-66 (1988); Glen N. Lenhoff, *Some Negative Aspects of Rule 11*, 67 MICH. B.J. 522, 523 (1988); Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 309-10 & n.3 (1990).

9. FED. R. CIV. P. 11(c), *reprinted in* 146 F.R.D. 401, 421 (1993).

vision to permit withdrawal from unsupportable positions and also de-emphasizes reliance on monetary sanctions.[10]

The critical question is whether the 1993 amendments to Rule 11 will strike an acceptable balance between the need of the federal courts to be free from wasteful, frivolous, or vexatious litigation and the obligation of attorneys to represent their clients vigorously and imaginatively without fear of reprisal. It is fair to conclude that Judge Schwarzer is far more optimistic about the potential benefits of the 1993 amendments than Dean Vairo.

Judge Schwarzer recognizes that the 1993 amendments were intended to address serious concerns regarding the 1983 version of Rule 11.[11] Nevertheless, he asserts that the recent changes build on the laudable initiative reflected in the 1983 Rule—regulating lawyers' behavior and promoting the enforcement of professional obligations.[12] The Judge emphasizes that Rule 11 must be read *in pari materia* with the new Rule 26 regarding mandatory prediscovery disclosure.[13] He suggests that the interplay between these mutually reinforcing rules heightens the professional obligations of lawyers in furtherance of the overall aims of the federal rules.[14] In sum, Judge Schwarzer appears optimistic that Rule 11, together with other recent amendments to the Federal Rules of Civil Procedure, will promote and enhance professional behavior by advocates in the federal courts.

In rather sharp contrast, Dean Vairo is far less sanguine about the benefits to be derived from the new Rule 11. Although she acknowledges that the recent changes are a "step in the right direction" from the perspective of Rule 11 critics,[15] Dean Vairo remains concerned about lingering conceptual and practical difficulties associated with the revised rule.[16] In fact, Dean Vairo seems unconvinced that the revised rule will adequately address concerns such as chilling effects and the deterioration of the attorney-client relationship.[17] The poten-

10. *Id.* at 421-23; *see also* FED. R. CIV. P. 11, Proposed Amendments to the Federal Rules of Civil Procedure, advisory committee's notes, *reprinted in* 146 F.R.D. 583, 587-88 (1993) [hereinafter 1993 advisory committee's notes] (discussing variety of possible sanctions that court has available).

11. Schwarzer, *supra* note 2, at 12-13.

12. *Id.* at 23.

13. *Id.* at 17-19.

14. *Id.* at 19.

15. Vairo, *supra* note 2, at 41.

16. *Id.*

17. *Id.* at 42-56.

tial for continued satellite litigation and fee shifting also troubles Dean Vairo.[18]

While Judge Schwarzer emphasizes the potential benefit of the new Rule 11 in promoting heightened professionalism,[19] Dean Vairo is more concerned that the independence of lawyers will continue to be threatened.[20] That is, the emphasis on the "officer of the court" aspect of lawyering may unduly constrain attorneys in the proper representation of their clients.[21] While being careful not to suggest that the United States' legal system is the equivalent of the German system under the Nazi regime, Dean Vairo does refer to the German experience and focuses on the loss of the independence of lawyers as a contributing factor.[22] In sum, while Dean Vairo views the 1993 amendments as a positive step, she still fears that the threat of huge fee awards as sanctions will threaten vigorous advocacy.

My own view of the developments reflected in the 1993 amendments stakes out a position that can best be described as "in between" the ideas expressed by Judge Schwarzer and Dean Vairo. While I do not fear that Rule 11 will destroy the independence of the practicing bar and lead to anything remotely resembling a fascist regime in the United States, there may still be significant problems associated with the new Rule.

To be sure, the 1993 amendments do reflect much needed improvement. The decision to make sanctions for Rule 11 violations discretionary rather than mandatory was a bold move that could reduce the chilling and fee-shifting effects associated with the 1983 version. The apparent rejection of a continuing duty approach is also a positive development, and the attempt to place greater emphasis on deterrence rather than fee shifting is laudable. It is also significant that the Committee Notes now emphasize that legal theories predicated upon minority opinions or views expressed in law review articles may be protected from assertions of frivolousness.[23]

Nevertheless, several potential problems loom on the horizon. The potential expansion of liability for represented parties may increase attorney-client friction and create conflict of interest problems. The retention of attorneys' fees as an option for trial judges could still

18. *Id.* at 67, 78.
19. Schwarzer, *supra* note 2, at 23.
20. Vairo, *supra* note 2, at 42-50.
21. *Id.* at 44.
22. *Id.* at 43-46.
23. 1993 advisory committee's notes, *supra* note 10, at 587.

result in fee shifting under the guise of deterrence. Most importantly, the retention of an abuse of discretion standard for appellate review may permit district judges too much leeway in deciding whether a violation has occurred and the nature of a sufficient sanction. Any determination regarding the validity of these concerns must await the development of a body of new Rule 11 jurisprudence.[24] Hopefully, federal courts will seek to implement the new Rule in a manner that accurately reflects the intent of the drafters to permit imaginative and vigorous advocacy.

24. In one recent appellate decision, the First Circuit recognized the potential impact of the new Rule 11. In Silva v. Witschen, 19 F.3d 725 (1st Cir. 1994), the court of appeals applied the 1983 version of the Rule but noted in dicta that the 1993 amendments were designed to make sanctions discretionary rather than mandatory and to emphasize deterrence rather than compensation or punishment. *Id.* at 729 n.5. If other courts take proper cognizance of these important changes, perhaps the 1993 version of the Rule will eliminate the most egregious problems associated with its predecessor.