1995

Why Congress Should Reject Revision of Rule 11

Carl W. Tobias
University of Richmond, ctobias@richmond.edu

Follow this and additional works at: http://scholarship.richmond.edu/law-faculty-publications

Part of the Civil Procedure Commons

Recommended Citation

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.
The United States House of Representatives recently passed the Attorney Accountability Act of 1995. Section 2 of the measure would modify existing Federal Rule of Civil Procedure 68 by prescribing two-way fee-shifting in diversity cases. Section 3 of the bill would amend Federal Rule of Evidence 702 in ways that limit expert testimony, ostensibly to increase “honesty in testimony.” Section 4 of the legislation would substantially revise the 1993 amendment of Federal Rule of Civil Procedure 11, effectively returning to the 1983 version of the provision. This essay emphasizes section 4 of the Attorney Accountability Act, because I believe that its enactment is inadvisable for many of the same, and certain additional, reasons as passage of sections 2 and 3 are unwarranted.

Section 4 of the Attorney Accountability Act would make four significant changes in the 1993 amendment of Federal Rule of Civil Procedure 11. The modifications would eliminate a provision which prescribes safe harbors for potential violators, would specifically make Rule 11 applicable to discovery, would make mandatory judicial imposition of sanctions for Rule violations, and would require that sanctions which judges levy compensate parties injured by Rule violations. Most striking about these changes is that they would legislatively reverse four important features of the 1993 amendment of Federal Rule 11 less than two years after the provision's substantial revision.

The United States Supreme Court and the other entities—such as the Judicial Conference of the United States, the Conference's Committee on Rules of Practice and Evidence, and the Advisory Committee on the Civil Rules—which are responsible for amendment of the Federal Rules, decided to revise Rule 11 in 1993 for numerous reasons. Perhaps most significant, the 1983 amendment of Rule 11 had proved to be the most controversial revision in the half-century history of the Federal Rules.

The major purpose of the 1983 amendment had been to deter frivolous litigation by encouraging lawyers to “stop and think” before filing papers and by requiring that judges impose sanctions when attorneys and litigants contravened Rule 11. The Advisory Committee Note which attended the revision reaffirmed the idea that deterrence was the modification's principal objective, but the amendment's language and the note were confusing because they stated that judges could award litigation costs, including attorney's fees, for Rule violations. Many lawyers seized on this ambiguity and invoked the Rule to seek the recovery of litigation expenses, and numerous judges were responsive to these requests, making attorney-fee shifting the sanction of choice.

Counsel's pursuit of reimbursement engendered much unnecessary, costly satellite litigation unrelated to the merits of cases. Unclear wording in the 1983 revision and the amendment's inconsistent judicial construction and application concomitantly led
to unwarranted expense and delay. Some lawyers also used Rule 11 for tactical purposes, such as threatening less powerful parties with the provision.

Many of the above considerations disadvantaged, and even had chilling effects on, resource-poor litigants, such as civil rights plaintiffs. Rule 11 was invoked against, and sanctions were imposed on, these parties more often than any other category of federal civil litigant, and judges levied large sanctions on some civil rights plaintiffs. These factors chilled the enthusiasm of the litigants whose lack of resources and power makes them risk-averse and susceptible to Rule 11's invocation.

The entities which were responsible for the 1993 amendment of Rule 11 apparently had several major objectives in revising the provision. The rule revisors meant to reduce Rule 11's invocation and concomitant satellite litigation by decreasing incentives to rely on Rule 11. Five ways in which the revisors sought to achieve these goals were by amending the 1983 Rule to provide for safe harbors, to make Rule 11 inapplicable to discovery, to make discretionary judicial sanctioning, to emphasize that deterrence was Rule 11's primary purpose, and to limit sharply the situations in which compensatory sanctions could be awarded. It is important to emphasize that passage of section 4 of the Attorney Accountability Act would reverse all of these decisions of the rule revisors.

Congressional enactment of section 4, therefore, would increase incentives to invoke Rule 11, multiply satellite litigation involving the provision, and enhance chilling effects attributable to Rule 11. The changes that section 4 makes would also increase expense and delay in federal civil litigation, thereby violating the express purpose of an earlier Congress in passing the Civil Justice Reform Act of 1990. The modifications would adversely affect individual parties, lawyers and judges as well as the civil justice system.

Perhaps less obvious, but equally important, passage of section 4 would effectively reverse the conscientious, several-year effort of the rule revisors and their expert advisors to improve Rule 11. The rule revisors commissioned an extensive study of Rule 11; assiduously wrote numerous draft changes of the 1983 Rule; sought, received, reviewed, and were responsive to voluminous public comment; and attempted to draft an amendment that was as clear and fair as possible. In the final analysis, the 1993 amendment substantially improved the 1983 version, while the rule revision process which led to the 1993 revision represented the type of open, rational process which the Congress contemplated in modifying that process in the 1988 Judicial Improvements and Access to Justice Act.

In short, the passage of section 4 could reinstitute the precise phenomena that the national rule revisors considered so problematic and carefully worked to exclude from Rule 11 less than two years ago. Enactment would require that judges, lawyers and parties master and implement a new Rule 11 shortly after it had been substantially amended. Passage could also eviscerate the 1993 revision before it has had an opportunity to work and before the Federal Judicial Center, an important research arm of the federal courts, has even had a chance to study the 1993 amendment's efficacy. Moreover, enactment would discourage the national rule revision entities which expended great effort on crafting an improved Rule 11 and members of the public who actively participated in the amendment process. Finally, and perhaps most importantly, passage may seriously compromise the national rule revision process at a time when it has become increasingly vulnerable.

The United States Senate will soon consider section 4 of the Attorney Accountability Act which would substantially change Rule 11 less than two years after its significant, well-considered amendment by the national rule revisors. The specific modifications that section 4 would implement are inadvisable because they promise to reinstitute the very problems, such as satellite litigation and chilling effects, which the 1993 amendment of Rule 11 was intended to ameliorate. Adoption of section 4 would also have
WHY CONGRESS SHOULD REJECT REVISION OF RULE 11, 160 F.R.D. 275

detrimental effects on the national rule revision process. The Senate, therefore, should scrutinize section 4 and be absolutely certain that it would greatly improve the 1993 revision of Rule 11 before passing section 4.

The views expressed are those of the author and do not necessarily reflect the views of the publisher.

Footnotes

a1 Copyright 1995 by Carl Tobias.

aa1 Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.


2 See H.R. 988, supra note 1, § 2; see also FED.R.CIV.P. 68.


4 See H.R. 988, supra note 1, § 4; see also 1993 amendment of FED.R.CIV.P. 11; 1983 amendment of FED.R.CIV.P. 11.

5 For example, the application of sections 2 and 4, if passed, could lead to satellite litigation and chilling effects. See infra notes 13–19 and accompanying text. The passage of sections 3 and 4 could correspondingly have adverse effects on the relevant rule revision entities, the Advisory Committee on Federal Rules of Evidence and the Advisory Committee on the Civil Rules.

6 See H.R. 988, supra note 1, § 4.


See, e.g., Burbank, supra note 13, at 1930–31; Tobias, supra note 8, at 1776.

See, e.g., Tobias, Reconsidering, supra note 7, at 876–77; see also Nelken, supra note 12, at 1327, 1340.


See, e.g., Nelken, supra note 12, at 1327, 1340; Vairo, supra note 16, at 200–01.


See Tobias, supra note 13, at 495–98; Vairo, supra note 16, at 200–01.

I rely substantially in this paragraph on Tobias, Revision, supra note 7; Tobias, supra note 8.

See FED.R.CIV.P. 11(c)-(d), reprinted in 146 F.R.D. at 421–23; see also Tobias, supra note 8, at 1783–88. Anecdotal evidence suggests that the amendment has had its intended effects. See Laura Duncan, Sanctions Litigation Declining, A.B.A.J., Mar. 1995, at 12.


See Tobias, Revision, supra note 7; Tobias, Reconsidering, supra note 7; Carl Tobias, Rule Revision Roundelay, 1992 WIS.L.REV. 236.

See Tobias, Revision, supra note 7; Tobias, Reconsidering, supra note 7; Carl Tobias, Rule Revision Roundelay, 1992 WIS.L.REV. 236.


160 F.R.D. 275